EFFECTS OF WAR ON PROPERTY

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TORONTO

EFFECTS OF WAR ON PROPERTY

Being Studies in International Law and Policy.

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WITH A NOTE ON

BELLIGERENT RIGHTS AT SEA

BY

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MACMILLAN AND CO., LIMITED

ST. MARTIN'S STREET, LONDON

1909

RICHARD CLAY AND SONS, LIMITED
BREAD STREET HILL, E.C., AND
BUNGAY, SUFFOLK.

PREFATORY NOTE

THIS little work does not profess to be anything like a complete treatise on the subject which it discusses; it is merely, as indicated on the title page, a collection of studies on the interesting subject of property in its various forms as affected by a state of war. Topics which have not hitherto received much attention from writers on international law have been dealt with more fully than those which have already been exhaustively treated.

The author has tried to discuss the various questions before him as much from the point of view of a practical statesman as of an international jurist, and hopes that the following pages may be found of interest in view of the approaching International Conference in London.

He takes this opportunity to make grateful acknowledgments to Admiral Fremantle for much useful information on the practical aspects of the question of the immunity of private property at sea from a naval standpoint. He is so deeply indebted to the teaching, the advice, and finally the encouragement of Professor Westlake that he finds it impossible to express his gratitude in words. He also expresses his obligation to Dr. Baty for his kindness in reading the proofs for press.

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ERRATA

Page 87, note 1, line 1, *for* "*Cassina*" *read* "*Classina.*"

Page 91, note 4, *for* "Barboux, *Jurisprudence*" *read* "Calvo, § 3033 Hall, p 717. *Cf* Barboux, *Jurisprudence*, p. 53"

Page 93, note 1, line 1, *for* "Montague" *read* "Mountague,"

EFFECTS OF WAR ON PROPERTY

INTRODUCTION

WAR is primarily an armed contention between *States*. States are aggregations of men, manifesting themselves and acting through individuals; hence war also establishes, secondarily, a hostile relation between States and individuals. "Individuals as such," says Bluntschli, "do not become enemies of the enemy State or its subjects; but, as citizens of a belligerent State, they are indirectly considered and treated as enemies to the extent of their public duties as citizens of such State, and the personal part they take in war waged by their State."[1]

The ancient conception of war was wider, and connoted a relation not only between States and hostile subjects, but between subjects and subjects as such. The principle had at any rate the merit of simplicity: all enemies could be slaughtered or enslaved and their property of every species seized wherever found. Physical impossibility was the only limit to a conqueror's greed.

[1] Bluntschli, *Le droit international codifié*, trans. by Lardy, 1881, §§ 531, 532.

Both Greeks and Romans considered *occupatio bellica* one of the lawful modes of acquisition, and Plato, Xenophon, and Aristotle, equally with the Institutes of Gaius, lay down that the property of the vanquished passes to the victors: *Things taken from enemies become ours by natural law.*[1]

The principle was a commonplace amongst the political writers of the Middle Ages. It was adopted by the founders of the Law of Nations and is found to survive in their writings down to the time of Vattel.

In his treatise *De Jure Belli*, of which the first part appeared in 1588, Albericus Gentilis, after defining war as *publicorum armorum justa contentio*, proceeds to lend his sanction, though not without a counsel of moderation, to the custom of pillage: *In the case of other things (not sacred) there is no doubt but that they may be seized by the victor.*[2]

Grotius, strictly speaking, does not recognise the existence of any *law* of war. He considers war a state of lawlessness, an illegal and abnormal state of things governed nevertheless by a set of usages. He wrote the book *De Jure praedae* (1604) at the instance of the Dutch East India Company in defence of the custom of pillage, and he quotes with approval the saying of Cicero, "It is not contrary to nature to despoil, if possible, him whom

[1] Gaius, II. § 69.
[2] Holland's edition (1877), 1, III. ch. VII. p. 301.

it is creditable to slay," [1] repeated in the monumental work *De Jure Belli ac Pacis* (1625), the fruit of his maturer labours.[2]

The *De Jure Naturae ac Gentium* of Puffendorf (1672) follows the same lines, but introduces a notable modification as to the moment when property seized in war vests in the captor. *Occupatio bellica* is no longer irrevocable until confirmed by a treaty of peace: "It should be noted, however, that ownership of things taken in war receives its final confirmation when he from whom they were taken renounces his claim to them by a treaty of peace." [3]

The rights of belligerents reach their high-water mark in the *Questiones Juris Publici* of Bynkershoek (1731), where the right of life and death over an enemy, barring the exceptions sanctioned by usage, is admitted. Everything is permitted against an enemy and his property:

"In war, the compact of mankind is in a measure dissolved, and we address ourselves to the subjection of the enemy and all that is his. If we follow (accept) the principle which governs the law of nations, everything is permissible against enemies because they are enemies. We make war upon an individual because we think that by an injury done to us he has deserved the destruction of himself and what is his, and this is the object for which we fight; the manner in which it is obtained matters little." [4]

[1] Grot. *De Jure praedae*, ed. Hamaker, p. 45.
[2] *Cf.* Grotius, *De Jure Belli ac Pacis*, Whewell's edition, Vol. III. ch. vi. ii. 1, p. 108.
[3] Puffendorf, *De Jure Naturae ac Gentium*, IV. c. vi. § 14.
[4] Bynkershoek, L. I. (c. 3), ch. 364.

In Wolff and his disciple Vattel we find a reaction against the extreme views of their predecessors on the question of the right of pillage. Though not denying it altogether, they hedge it round with many conditions. The *Jus gentium methodo scientifica pertractum* (1749) of Wolff forbids general pillage, and limits contributions to the amount actually necessary for the maintenance of troops.

Vattel reproduces the time-honoured conception of war:[1]

"When the ruler of the State, the sovereign, declares war against another sovereign, it is assumed that the whole nation declares war against another nation. . . . These two nations are therefore enemies, and all the subjects of the one are enemies of all the subjects of the other. Custom is here in conformity with principles."

He then proceeds to declare that pillage is only justifiable as a means of weakening the enemy, and praises the system of contributions as a substitute for pillage: he admits that war must live on war, but, as subjects buy immunity from pillage by the payment of contributions, their private property ought not to be seized.

The philosophers of the eighteenth century took in hand the reform of the laws of war. The *Contrat Social* of Rousseau formulates a theory which, though it exceeds the bounds of common-sense, has exercised a profound, and in many ways beneficial, influence on the development of this branch of international law.

[1] Vattel, *Droit des gens* (1758), III. § 70.

"War, therefore, is not a relation of man to man, but a relation of State to State, in which individuals are only enemies as it were by accident, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders."[1]

The same idea is repeated in the inaugural discourse of Portalis at the first sitting of the Conseil des prises. Portalis, however, does not go so far with Rousseau as to say, in so many words, that war establishes *no* relation between a State and the subjects of the enemy State.

In the famous Prusso-American treaty of 1785 the modern conception of the sanctity of private property on the sea, the pet hobby of the American Foreign Office, is embodied in all its completeness.

The current of progress was checked by the wars of the French Revolution and Empire. The Directory started with the most admirable theories, but as the wars lengthened out from year to year, and the fight became more desperate and more bitter, the humaner ideals of generals and statesmen were necessarily blurred. The treaties of Vienna of 1815 not only pacified and reconstituted Europe, but restored to her the Rule of Right, and marked a fresh starting-point in the progress of the Law of Nations.

The development of the various sections of international law relating to property, often hastened by fortuitous circumstances, has not been uniform. In a few sections such as those relating to property at sea,

[1] Rousseau, *Contrat Social* (1762), p. 12.

the old law survives in almost all its original severity, in others it has been modified; whilst in some a still milder usage has prevailed, belligerents having entirely lost the right of capture. With but few exceptions, however, the nineteenth century was an era of constant progress. During this century the pillage of stormed cities was forbidden, and the rights of the occupying enemy limited and defined; this is the century of the Declaration of Paris and the Conferences of Geneva, of Brussels, of Berlin, and The Hague.

Scope of this Work.

Rivier bases the entire law of war, and consequently of property in time of war, on the principle that violence is lawful only to the extent to which it is necessary to give victory to a belligerent:

> "The object of every belligerent is victory. Such violence as is necessary in order to attain this object is, in general, permitted; such as is not necessary is unlawful." [1]

According to Hall, "property can be appropriated of which immediate use can be made for warlike operations by the belligerent seizing it, or which if it reached his enemy would strengthen the latter either directly or indirectly, but on the other hand property not so capable of immediate or direct use or so capable of strengthening the enemy is insusceptible of appropriation." [2]

Neither dictum is quite satisfactory. Not having

[1] Rivier, *Principes du droit des gens*, II. p. 239.
[2] Hall, *International Law*, 5th ed. p. 420.

developed under the domination of any single idea, the portion of international law that treats of hostile and neutral property in time of war is a heterogeneous collection of rules that defy any attempt to reduce them to one principle. Each subsection stands by itself and needs individual treatment.

It is as venturesome to state general principles as it is to give a definition, but an attempt must be made to clear the ground and to lay down the lines for a discussion of the subject. Something of the kind is necessary in order to understand the actual practice of States, to appreciate the proposed changes, and to make up our minds as to the directions in which improvements must be effected.

For our purpose it is necessary to divide enemy property into three classes :

1. Hostile State property on land.
2. Hostile private property on land.
3. Hostile property (public and private) at sea.

It may be said that a belligerent can seize or destroy enemy property under the following circumstances :

1. Public property of the enemy, if found within a belligerent's own territory or if it can be carried off to it.

2. Private property of enemy subjects on land if *directly* useful to either belligerent.

3. Public and private property of the enemy at sea except when covered by a neutral flag.

This essay is concerned with these three cases. Here the existence of war, as such, alters the jural

nature of the property concerned, so that effectual seizure without the addition of any other circumstances transfers the legal title to possession.[1] In this respect such property differs from that of neutrals captured as contraband of war or for breach of blockade. Mere seizure does not in the latter case effect a transfer of title, since this right of seizure flows not from the nature of the property, which remains unaffected by the mere fact of war, but from the conduct of their neutral owners which a belligerent is entitled to punish by seizure followed by condemnation in a prize court. Until a duly constituted tribunal condemns them, such goods continue to be the property of their previous owners.[2]

The law of blockade and contraband is therefore outside the scope of this book.[3]

It will, however, be necessary to consider the circumstances under which neutral property acquires

[1] Commodore Stewart's Case, Scott's *Cases in International Law*, p. 910, and the authorities cited in the judgment.

[2] It has recently been held in this country, in the case of a neutral ship seized for carrying contraband of war, that "capture without condemnation does not divest the owner of his property." Per Channell, J., in Andersen *v.* Marten, 2 K.B. (1907), on p. 254. The same learned judge proceeded to lay down in this case (on p. 255), following a passage in *Abbott on Shipping* (11th ed., 1867, by Mr. Justice Shee, p 24), that "although mere capture in itself, when there is no condemnation, does not divest the property, yet, when there is an adjudication *in rem* binding on all the world, it is a decision, not merely that the property has passed at the date of the decision, but that it did pass at the time of the capture, and its effect therefore may be described as relating back." It is submitted with deference that the passage in *Abbott* cited refers, not to captures of *neutral* ships, but to captures "from an enemy in time of war," to which quite different principles apply.

[3] The law of blockade and contraband has been ably and adequately treated in two recent works: L. A. Atherley-Jones, *Commerce in War* (1907), and Smith and Sibley, *International Law as interpreted during the Russo-Japanese War* (1907).

a hostile character and becomes liable to capture on land and at sea.

The effect of conquest on property belonging to both belligerents and neutrals in the conquered territory—a chapter of international law on which there has recently been much controversy—will claim separate treatment.

CHAPTER I

PROPERTY OF ENEMIES AND NEUTRALS ON LAND

SECTION I.—*Military Occupation*

THE military occupation of the enemy's territory must be discussed before proceeding to study the effect of war on property on land.

"Territory is considered to be occupied when it is placed as a matter of fact under the authority of the hostile army. The occupation extends only to territories where that authority is established and capable of being exercised."[1]

The position of a belligerent in occupation of his enemy's territory is purely *de facto*, won by the sword and kept by the sword, but it sets up a definite series of facts with legal consequences. It is impossible that two supreme Powers should rule one and the same territory at the same time. In the territory occupied the legitimate sovereign is deprived for the moment of the essence of his position—*i.e.*, the power to give commands sanctioned by punishment. He is unable to give protection to his subjects, and the latter are in consequence relieved temporarily from the correlative duty of obedience to him.[2]

[1] Hague Regulations, Art. 42.
[2] Bluntschli, *op. cit.* § 544.

In every orderly civilised community sovereignty must reside in some definite person or body of persons in order that existing rights and institutions may be preserved. Further, the belligerent lawfully, though only temporarily, in possession must be permitted to use his position to prosecute the war against his enemy. International law provides for the preservation of society as well as for the prosecution of the belligerent's operations. The Hague Rules impose on the occupying Power the duty of preserving the moral order of the community :—

"The authority of the legitimate Power, having passed as a matter of fact into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." [1]

This duty necessarily implies a corresponding duty on the part of the non-combatant inhabitants of the territory to submit to the rule of the invader.[2] It would be absurd to expect the latter to preserve the private rights of the inhabitants if they do not help him to keep the peace. The population cannot be compelled to take part in military operations against their own country,[3] but at the same time they must not hinder the occupying Power.

The invader is, in brief, substituted for the dis-

[1] Hague Regulations, Art. 43.

[2] Bluntschli, *op. cit.* § 544. Birkhimer, *Military Government and Martial Law*, p. 40.

[3] Hague Regulations, Art. 44.

placed State, and wields a quasi-sovereign authority.[1] The rights of the latter are, of course, not extinguished but only suspended.

In U.S. *v.* Rice, Story, J., said that—

"by the conquest and military occupation of Castine' United States port, temporarily occupied by the British forces—"the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws and such only as it chose to recognise and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience." [2]

Every act of the *de facto* ruler, to be valid, must be strictly limited by the transitory nature of his authority. He can confer no rights, real or personal, except against himself, and he can make no changes, to take effect beyond the term of his *de facto* rule, in the permanent immovable *corpus* of his enemy's possessions. He can only confiscate what he can carry away of the enemy State's property, in the natural course of things, to his own jurisdiction, where he can permanently defend its possession. In order, however, to effect a transfer of a title of movable property, it is sufficient if it is seized and the power to carry it away is present though not exercised. Thus, as will be seen later, the belligerent

[1] De Martens, *Traité de droit international*, III. § 117. Rivier, *op. cit.* III. p. 300.

[2] 4 Wheat. 246

may seize and confiscate the movable goods and gather the fruits of the immovable property of the enemy State without waste, but he may not alienate the property itself. The acts of the invader that exceed this rule will not be binding on the legitimate sovereign.

Hall brands the doctrine of temporary sovereignty as artificial, unnecessary, and inconsistent, and bases the existing rules "on the broad foundation of simple military necessity."[1]

The charge of artificiality has little weight. Strictly speaking, all legal principles are artificial, since law takes its origin in arbitrary individual rules and not in general maxims. But such principles, provided they are correct, are necessary as an aid to clear thinking and for the solution of novel cases. The allegation of inconsistency is more serious, but there is no contradiction between the theory of quasi-sovereignty and the principle that the occupying Power has no right to impress his quasi-subjects into his service as soldiers. The right to exact military service flows from the purely personal relation between the *de jure* sovereign and his subjects. It is a high exercise of State authority which cannot be permitted to the mere usufructuary of local sovereignty, who is only allowed to step into the shoes of his enemy under definite limitations.

To base the law of military occupation on "simple military necessity" is unsatisfactory.

[1] Hall, *op. cit.* p. 468 *et seq.*

Such necessity would no doubt be a sufficient foundation if the invader were bound only by duties of abstention so far as the inhabitants of the country, temporarily under his control, are concerned. It is, however, not so, for, as we have seen, many active duties, such as the re-establishment of public order and safety, the protection of the rights of individuals, &c., fall on his shoulders, which can by no means be deduced from "simple military necessity." Such duties imply a position of quasi-sovereignty.

Section II.—*Property of the Enemy (State) on Land.*

War, as we have seen, is primarily a conflict between States; hence it follows that a belligerent has special rights over the public property of the enemy. No country can continue to fight if deprived of its natural resources; that money is the sinews of war is a commonplace that needs no demonstration in these days of costly armaments and monster armies. Further, the loss in fighting power of the one is often the gain of the other, as the Japanese have found in the case of the Russian ships captured by their navy.

It has been stated already that a belligerent is justified, as a general rule, in seizing or destroying all property belonging to the enemy State, movable and immovable, corporeal and incorporeal, that he can seize within his own jurisdiction or carry off

to it. Thus he may appropriate not only the enemy's depôts of arms and ammunition and other stores and supplies which may be used for military operations, but also his cash and other movable property of every description.

These ample rights are, however, limited by considerations based on humanity, or on the general interests of mankind, and further by the doctrine that the damage caused to the enemy must not be out of all proportion to the advantage gained by the other side.

The several exceptions, real or alleged, will now be considered.

I. The property of local bodies, as well as that of religious, charitable, and educational institutions, and property devoted to arts and sciences, even though vested in the State, cannot be confiscated or damaged. Historical monuments and works of art and science are inviolable, and must be protected as far as possible from harm.

This is the provision of Art. 56 of The Hague Convention, which reproduces a well-established rule of the law of nations. During the wars of the eighteenth century, works of art and the contents of museums and libraries used to be spared on the same grounds that damage to royal palaces was avoided—*i.e.*, in courtesy to the prince to whom they were supposed to belong. This rule continued unaltered even when ideas changed, and works of art came to be considered the property of the nation and not of the sovereign as such. Napoleon, however, made it a

practice to plunder the art treasures of the countries he overran, rifling the galleries of Italy and the museums of Germany with equal ruthlessness. The allied Powers restored all this booty without exception to its former owners,[1] even where the capture had been confirmed by treaty.

II. Judicial and other public records and the archives of the State have always enjoyed a special immunity, except where they are directly useful in the prosecution of the war.[2] The ground of their exemption is their vital importance to the social life of the nation, coupled with their comparative uselessness to the enemy; and injury to these would be universally branded as an act of sheer vandalism.

As an instance of a justifiable seizure of such documents may be mentioned the case of the Saxon State Papers taken at Dresden by the Prussians from the bedroom of the Queen of Poland. These documents proved that Frederick, in beginning the Seven Years' War, had merely anticipated the powerful coalition contrived for his ruin by his arch-enemy, Maria Theresa of Austria.

III. Some writers[3] have attempted to establish an immunity in favour of the rolling-stock of railways, telegraphs, postal wagons, steamboats (other than those governed by maritime law), &c., belonging to the State on the principle that *superficies solo cedit*; Art. 53 of The Hague Convention has, however,

[1] Hall, *op. cit.* p. 423.
[2] *Ibid.* p. 423. Rivier, *op. cit.* II. 312.
[3] Rivier, *op. cit.* II. 311.

removed all doubt on the subject by expressly declaring all means of transport owned by the hostile Government liable to confiscation.

IV. The Geneva Convention of 1906, superseding that of 1864, lays down the following rules in regard to the property employed in the service of the sick and wounded in time of war:

> Art. VI. Mobile medical units (that is to say, those which are intended to accompany armies into the field) and the fixed establishments of the medical service shall be respected and protected by the belligerents.
>
> Art. XIV. If mobile medical units fall into the hands of the enemy they shall retain their material, including their teams, irrespectively of the means of transport and the drivers employed.
>
> Nevertheless, the competent military authority shall be free to use the material for the treatment of the wounded and sick. It shall be restored under the conditions laid down for the medical personnel, and so far as possible at the same time.
>
> Art. XV. The buildings and material of fixed establishments remain subject to the laws of war, but may not be diverted from their purpose so long as they are necessary for the wounded and the sick.
>
> Nevertheless, the commanders of troops in the field may dispose of them, in case of urgent

military necessity, provided they make previous arrangements for the welfare of the wounded and sick who are found there.[1]

The protection accorded under the convention ceases, however, if the unit and establishment engage in acts of hostility against the enemy except in their own defence or that of the sick and wounded in their charge.

Voluntary aid societies share the privileges accorded to the State medical organisations, provided they are authorised by the national Government and their names have been previously notified to the enemy.

A recognised society of a neutral country is only permitted to aid one of the belligerents with the previous consent of its own Government, as well as that of the belligerent concerned, and after due notification, as in the case of national societies, to the enemy.

V. The occupying Power may collect the taxes and imposts due to the dispossessed State. He must, however, do it as far as possible in accordance with the rules of assessment in force, and so he is bound in the first instance to provide for the expenses of the administration. He is, however, entitled to appropriate the surplus, if any. Payment to him gives a final discharge as against the legitimate sovereign.[2]

VI. A belligerent is only the administrator and usufructuary of the enemy's public immovable

[1] Whittuck, *International Documents*, pp. 74, 77.
[2] Art. 48 of The Hague Regulations.

property situated in territory under military occupation. The State domain and public buildings cannot be alienated. They may be used and their profits and revenues appropriated, provided their substance sustains no injury.[1]

The annual produce of forests, for example, is lawful prize, but trees must not be cut down contrary to the principles of forestry. Thus, in 1870, the German authorities sold 15,000 oaks in the State forests of the Departments of the Meuse and the Meurthe, of which 9,000 were removed and the rest finally came into the possession of Mohr and Haas, who contracted to sell them to one Hatzfeld. After the war, the French Government seized the oaks that remained, and Hatzfeld refused to pay the sale price of the trees. It was held by the Court of Appeal of Nancy that the German Government had no right to sell the oaks, the disposal of which amounted to an act of waste, that the property in the said oaks continued in the French Government, and that the plaintiffs, Mohr and Haas, must consequently fail in their suit, as they had agreed to sell to Hatzfeld what was not theirs.[2]

These limitations on the belligerent's acts are the natural consequence of the temporary nature of his power. They are generally observed, for the simple reason that it would be difficult to disregard them. The occupying Power could not give a warranty of title to the purchasers, and the legitimate sovereign would

[1] Hague Regulations, Art. 55. Calvo, *Droit International*, Vol. IV. Book VI. §§ 2204, 2205, p. 238

[2] *Snow's Cases*, p. 317. Dalloz, 1872, II. p. 229.

ignore voluntary transactions that derogated from his rights. Few persons would care to invest their money at such risks.

The invader is, of course, entitled to demolish roads, bridges and fortresses as a part of his military operations.

Can lands and houses belonging to the enemy State situated within the territory of a belligerent be confiscated? Supposing the Transvaal Republic had owned State warehouses at Cape Town, could these have been seized and sold by the British Government on the outbreak of the South African War?

The question is interesting but not important. It is not often that a State owns much immovable property in another State, especially as the legislation of most countries expressly forbids this. Residences of ambassadors, if belonging to their own State, are not likely to be interfered with in time of war, even when their occupants have been recalled.

There can be no doubt that all other immovable property is liable to be confiscated.[1] There is no reason whatever for exemption. No more damage is caused to the one State than profit to the other, and the proceeds of the property swell the national war fund. Further, there is no object in encouraging foreign States to acquire immovable property outside their own jurisdiction.

The new State of Panama has invested a portion of the sale price of the site of the Panama Canal in house property in New York. The United States has

[1] Holtzendorff, *Handbuch*, IV. § 116, p. 497.

thus, without any effort on its own part, obtained a very effective pledge for the future good behaviour of its *protégé*.

Similarly, leases of territory, such as that of Kiauchau by the Germans and of Wei-hai-wei by Great Britain, are liable to be determined on the outbreak of war between the contracting parties.

VII. There is considerable difference of opinion as to the position of debts due to the enemy State. The subject will be better understood if it is considered under the following heads.

1. Debts due from a belligerent State to the enemy State.

2. Debts due from individuals to the enemy State which are (*a*) payable within the territory of the belligerent, (*b*) payable within territory under military occupation.

1. *Debts due from a Belligerent State to the Enemy State.*

The authorities are undecided as to the fate of such obligations. Von Holtzendorff and Despagnet think that a belligerent is not bound to pay a debt or interest thereon to his enemy so long as the war continues.[1] Calvo considers all public debts, whether due to an enemy or to his subjects, sacred.[2] It seems that the latter is the correct view. The credit of a country is one of its most important assets in

[1] Von Holtzendorff, *Handbuch des Völkerrechts*, IV. § 116, p. 496. Despagnet, *Droit. Int. pub.* § 620.

[2] Calvo, *op. cit.* IV. vi. § 2289, p. 279.

time of peace and war, and, considering the extreme sensitiveness of the international money market, it is unlikely that States will interfere with the rights of holders of their securities, whoever they may be.

2. (a) *Debts due from Individuals to the Enemy State and Payable within the Belligerent's Jurisdiction.*

It has been held that "a debt is created by contract, and exists till the contract is performed. Legislative interference to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of the law, does not in strictness destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country payment is frequently enforced." [1]

This view of a contract, that considers the *vinculum juris* as something independent of the obligation, cannot, it is conceived, be accepted. A legal obligation is a creature of the law. It exists because it can be enforced. If the *right of action* on a contract be taken away, the debt disappears also.[2]

As an obligation is nothing but a right of action, it follows that one obligation cannot give rise to more than one right of action. A debt

[1] Per Ellsworth, C.J., in Hamilton *v.* Eaton. 2 Mart. N.C. 83. Fiore takes the same view, *Nouv. Droit Int. Pub.* II. ii. 6, p. 311.

[2] Westlake, *Priv. Int. Law*, p. 300.

must necessarily be enforceable in one jurisdiction only and nowhere else.

It is the domain of private international law to determine the *forum* where the creditor has a right of action, or in other words the *forum* where, and where alone, the debt exists, but the legislations of the various countries of the world have not adopted any uniform rule on this point. As a matter of fact it often happens that a debt can be enforced in several jurisdictions—*e.g.*, the *forum celebrati contractus*, the *forum solutionis*, or the *forum domicilii* of the debtor or even of the creditor. The law of nations, however, cannot take into account the idiosyncrasies of national legal systems, but must adopt the one principle dictated by reason and supported by the authority of the Roman law. "The opinion has gained ground that the place of fulfilment, whether determined by the contract, or only to be inferred from the nature of the case, furnishes the true *forum* of the obligation." [1] Public international law must be taken not to recognise the validity of public acts in reference to an obligation in any other *forum* but this.

Debts due from individuals to the enemy State and payable within the belligerent's jurisdiction are, therefore, nothing but rights of action enforceable in the belligerent's country and nowhere else.

A debt establishes an essentially personal relation between the debtor and the creditor. The right of action on an obligation inheres in the creditor, and a

[1] *Op. cit.* p. 227.

discharge can only be effected by payment to him alone and not to any third person. Properly speaking, therefore, it is impossible to *confiscate* a debt. When a State is said to "seize the credits" of the enemy it really performs a twofold act. In the first place it permanently bars the enemy's right of action, and secondly it exacts the amount of the debt from the debtor, who would otherwise enrich himself without cause.

On the principles applying to the seizure of immovable property,[1] a State may thus help itself not only to the money debts, but to contractual obligations of all kinds due to its enemy, whether present or contingent, accruing or accrued. There is no distinction on principle between these various classes.

For example, in the event of a war with Germany, England could seize the present value of fixed deposits in an English bank becoming due to the German Government a year hence. If Germany should have paid for and ordered typewriters from the Remington Company to be delivered a year hence, the British Government would be entitled to direct the Remington Company, either to deliver to itself, at once, as much of the order as had been completed, together with the balance of the purchase money, or to deliver all the typewriters a year hence, according to the original agreement.

By virtue of such an order the German Government would be debarred perpetually from suing under this contract.

[1] See p. 42.

(b) *Debts due from Individuals to the Enemy State and Payable within Territory under Military Occupation.*

There are few topics of international law which have provoked so much controversy as the question whether an invader can seize incorporeal rights belonging to his temporarily dispossessed enemy. It is unnecessary to enter into the merits of the arguments on either side, since the question has fortunately been settled by Art. 53 of The Hague Regulations. The army of occupation can take possession of the enemy's "realisable[1] securities," a term which includes all obligations already accrued or that accrue during the occupation.

Holtzendorff, Heffter, Phillimore, Fiore, Calvo and Hall[2] have denied this right on the ground that incorporeal rights cannot be seized. They inhere, they say, in the creditor, payment to whom alone can give a discharge to the debtor.

It is true, as has been said above, that no debt can be "confiscated." But the position of the occupying belligerent is this. He is in possession *de facto* of the machinery of the displaced Government, and he is bound to respect the laws of the country except in so

[1] There is little doubt that the official translation of *valeurs exigibles* as "property liable to requisition" (p. 334 of the Blue Book on The Hague Conference, 1899) is incorrect. *Cf.* Holland, *Laws and Customs of War on Land*, p. 78.

[2] Holtzendorff, *Handbuch*, IV. § 116. Heffter, *Das europaische Völkerrecht der Gegenwart*, 5th ed., § 134. Phillimore, *Com. on Int. Law.* III. 817. Fiore, *Nouveau Droit Internat.* translated by Pradier-Fodéré, (1868), II. ii. § 6, pp. 310–12. Hall, *op. cit.* p. 421.

far as they are advantageous to his opponent and unfavourable to himself in his operations. Further, all acts and orders of the military Government in the prosecution of the war are valid in so far as they relate to conditions arising and exhausting their effects during the occupation. The belligerent is therefore entitled to prevent the inhabitants of territory occupied by him from adding to the resources of the enemy by making any payments to him. Further, the belligerent can direct sums of money equivalent to the amount of the debts to be paid to himself, so that the debtor may not be enriched without cause. If, on the termination of the occupation, the legitimate sovereign sues the debtor on the ground that payment to a third party could not extinguish the obligation, he will be met by the plea of set-off. A State is bound to protect its subjects against the public enemies.[1] In this case it failed to do so, and the debtor was compelled, under martial law, to pay the amount of the debt to the invader. On the part of the debtor, therefore, there will be at least a moral claim to damages and *etiam quod natura debetur, venit in compensationem.*[2]

The invader's right to collect the enemy State's debts in general is, in principle, the same as his right to collect, as they accrue, the rents of such of the latter's immovable property as was let before the occupation.[3]

[1] Fiore, *op. cit.* II. ii. c. 3, p. 265.

[2] Dig. XVI. 2, 6.

[3] The contrary view has been adopted by Westlake, *Int. Law: War*, p. 103.

VIII. In the wars of the eighteenth century the palaces, lands and other private property of sovereigns were respected as an act of courtesy due from one prince to another. Modern international law distinguishes between two different kinds of property of which the head of a State may be in enjoyment. One consists in palaces, lands, etc., belonging to a State, which are placed at the disposal of the ruler for the time being to add dignity to his position. The other includes his own private fortune. The former shares the fate of other public property, while the latter enjoys the immunities and is subject to the burdens of the private effects of subjects.[1]

The French Cour de Cassation has had occasion to apply these principles in an interesting case where the facts were as follows :

William, Duke of Looz-Corswarem, owned considerable landed property on the left bank of the Rhine in the province of Liège, in the county of Looz, in Belgium (previously known as the Austrian Netherlands), and in French Flanders. The lands situated in the Austrian Netherlands he owned in a private capacity and not as a prince of the German Empire. When in 1792 the armies of the French Republic conquered Belgium, Looz, and the portions of the Empire to the west of the Rhine, the Duke retired to Germany. His lands were sequestered under the decree of May 9th, 1793, which directed the seizure of the property,

[1] Despagnet, *Droit. Int. pub.* § 92. Rouard de Card, *La Guerre Continentale et la Propriété*, p. 116 *et seq.*

situated in French territory, of all princes and Powers with whom the Republic was at war.

On October 11th, 1797, the Treaty of Campo Formio was concluded between the Emperor and the Republic, Art. 2 of which provided :

"Immediately after the ratification of the present treaty the contracting parties shall remove all sequestration from the property, rights and revenues of individuals residing in the respective territories and in the lands pertaining thereto, as well as from the public buildings situated in them."

Whilst the degree of attachment was still in force, the Duke had mortgaged the lands which he owned in Belgium as a private person. On his death his heirs contended that the mortgage, having been effected whilst the lands were under attachment, was void.

The Cour de Cassation, affirming the order of the Court of Paris, which had reversed the judgment of the Civil Tribunal of the Seine, held that the sequestration was of no effect on the private property of Duke William. It based its decision on the following grounds :

"Whereas it follows from Art. 3 of the Treaty of Campo Formio and from Arts. 2 and 6 of the Treaty of Lunéville that Duke William of Looz was deprived of the property and lands which he held in his capacity as a German prince ; but whereas it also follows from Art. 9 of the Treaty of Campo Formio and Art. 9 of the Treaty of Lunéville that Duke William retains the ownership of the property which he possessed as a private individual in the Austrian Netherlands and other districts belonging to France on the left bank of the Rhine :

"And whereas this distinction is actually in conformity with the principles of the law of nations which have always been upheld by publicists." [1]

[1] Sirey, t. XVII. p. 217.

Section III.—*Property of the Subjects of the Hostile State in the Latter's Territory.*[1]

The Hague Regulations formally prohibit pillage, even of places taken by assault, and declare private property on hostile territory inviolable. This is merely a reproduction of maxims which, though often disregarded in practice, had long become firmly established in international law.

We will now proceed to consider the cases in which the general rule is modified.

I. *Booty.*—Arms, horses, and military papers seized from combatants on the field of battle, even though private property, are lawful booty.[2] Seizure of such objects and their deposit *intra praesidia* effects a legal transfer of ownership. The term booty, however, does not include objects not useful in war, such as watches and jewellery worn by soldiers.[3] It is the duty of the Bureau of Information, respecting prisoners of war, "to receive and collect all objects of personal use, money, letters, etc., found on the battle-fields, or left by prisoners who have been released on parole, or exchanged, or have died in hospitals and ambulances, and to transmit them to those interested."[4]

II. *Objects useful in Military Operations.*—"All means employed on land, at sea, or in the air, for sending messages, for the carriage of

[1] Hague Regulations, Articles 28, 46, 47.

[2] Bluntschli in *Revue de droit international*, Vol. IX. p. 548. Rivier, *op. cit.* II. p. 319. Hall, *op. cit.* p. 437.

[3] Hague Regulations, Art. 4.

[4] *Ibid* Art. 14.

persons or things, apart from cases governed by maritime law, depôts of arms, and, generally, all kinds of war material, may be taken possession of, even though belonging to private persons, but they must be restored, and the compensation to be paid for them shall be arranged for on the conclusion of peace." [1]

If the belligerent exploits these objects apart from using them for purposes of war, he must keep an account of the profits, which must be paid to the owners when peace is concluded.[2]

On the other hand, if such material is actually in use by the enemy's forces, or is actively helping his operations, it must be held to have become a part of his military equipment, and, as such, liable to confiscation. For example, trains conveying ammunition, or troops, or carts, and horses carrying food and fodder to the hostile army can be seized as booty of war.

III. *Requisitions* consist in articles of food, fodder, and clothing needed by an army for consumption; and the term includes the compulsory labour, whether paid for or not, of workmen and artisans.

Requisitions have always been levied by belligerents in the enemy's territory, and are justified by the necessities of warfare. The Hague Regulations provide, however, that " neither requisitions in kind, nor services, can be demanded from localities or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to

[1] Hague Regulations, Art. 53. [2] Rivier, *op. cit.* II. p. 322.

involve the population in the obligation of taking part in military operations against their country.

These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied. Supplies in kind shall, as far as possible, be paid for on the spot; if not, the fact that they have been taken shall be acknowledged by receipts, and the payment of the sums due shall be made as soon as possible.[1]

In cases of urgent necessity, however, the troops would be justified in collecting fuel and food for themselves and fodder for their animals from the fields or storehouses of individuals.[2]

The practice of paying for articles requisitioned by the public forces was very generally adopted by Great Britain during the nineteenth century. The British army, when it entered France in 1813, paid for all it took, and the Allies adopted the same system in the Crimea. The practice of payment had, however, in these and other cases been based on grounds of expediency and established no binding rule, but The Hague rule will no doubt be followed in the wars of the future. Only the inducement of liberal prices will dissuade the inhabitants from hiding or destroying the supplies required for a mammoth army. On the other hand, the invader will be put to no greater loss than he would be otherwise, as he will always be at liberty to recoup himself by the levy of contributions on the territory as a whole. This will enable him to

[1] Hague Regulations, Art. 52.

[2] Hall, *op. cit.* p. 437.

procure his food and supplies with the greatest ease to himself without inflicting unnecessary hardship on individuals.

A naval force may similarly exact, on pain of bombardment, supplies of victuals and other provisions necessary for its immediate wants from undefended localities. Such requisitions must not be out of proportion to the local resources.[1]

IV. *Contributions.*—A great exception to the general rule of the immunity of private property is furnished by the system of levying contributions, consisting in payments in money taken by the invader over and above the produce of the usual taxes. The Hague Regulations provide that "no contribution shall be levied except under a written order, and on the responsibility of a Commander-in-Chief. This levy shall, as far as possible, take place only in accordance with the rules which are in force for the assessment and incidence of taxes. For every contribution a receipt shall be given to the payer." [2]

We will now consider the various kinds of contributions.

(*a*) The General of the Army of Occupation may find the existing taxes and imposts insufficient for the expenses of the civil administration. He may, for example, find it necessary to repair hospitals and dispensaries damaged in the course of the hostilities. Under such circumstances he may

[1] Westlake, *International Law: War*, p. 316.
[2] Hague Regulations, Art. 51.

impose additional taxes on the population to be benefited by the works.[1]

(*b*) Contributions may also be levied in lieu of requisitions. A tax imposed on the inhabitants on the basis of the existing assessment is indeed to be preferred to exactions in kind, which are bound to work injustice in individual cases and to cause much unnecessary suffering.

(*c*) Can a poor State at war with a rich enemy levy contributions within the latter's territory to pay the expenses of the war? The question is an important one, since modern warfare inflicts a crushing burden on a belligerent. To deny the right of a poor nation "to make war live on war" would be to condemn countries like Montenegro to certain failure in a war against any one of their wealthy neighbours. The prohibition would, in fact, convert the community of nations into a plutocracy in which the rich alone had the right to live. This view of the case cannot be accepted. If the occupying Power finds itself really unable to pay the expenses of the war it may levy such contributions as the resources of the country will bear. Its action will be covered by the words of Art. 49 of The Hague rules, which permit the levying of contributions in addition to the usual taxes, provided they are for military necessity.

(*d*) There are cases, however, where contributions are not justified by military necessity of the kind just suggested, but merely go to enrich the invader and save him from a portion of the cost of his army.

[1] *Cf.* Hague Regulations, Art. 49.

Thus, when the Allies entered Paris in 1815, Blücher demanded an immediate contribution of 100 million francs to pay his troops, and justified his demand by citing Napoleon's behaviour in Berlin.

Again, in the war of 1866, the Prussians imposed crushing burdens on many German cities, notably on Frankfort. The same policy was pursued in France in 1870–1. At Orleans General von der Thamm exacted 6,000,000 francs in one day; Rouen had to find 6,500,000 francs in five, whilst the little town of Haguenau was compelled to borrow from the bankers of Bâle to pay its contribution of 1,000,000 francs. In the thirty-four departments they invaded the Germans raised altogether the enormous sum of 39,000,000 francs.[1]

Contributions of this kind do not differ from general pillage except in name, and are not allowed by international law.[2]

(*e*) The occupying Power can also inflict a contribution on a commune or a locality, by way of fine, for disobedience to its orders, or organised attacks on its authority. The Hague Regulations provide that "no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."[3]

(*f*) The question whether a naval force can exact sums of money from unfortified coast towns on pain of bombardment is of considerable moment in

[1] Rouard de Card, *La Guerre continentale et la Propriété*, p. 178.
[2] Bluntschli, *op. cit.* § 654. [3] Hague Regulations, Art 50

England, whose shores abound in rich, undefended towns. Brighton and Liverpool would offer tempting baits to an adventurous cruiser. There is reason to believe that the French Ministry of Marine considers this a legitimate operation of war, a view that seems to be shared by many naval officers on this side of the Channel.

Hall distinguishes between two cases: first, where the squadron is in a position to land a force to occupy a town, and, secondly, where it is not. In the former case he allows contributions. In the latter a levy of money "is not a contribution at all; it is a ransom for destruction." [1]

There appears to be no valid ground for the distinction. It would seem that in basing the right to levy contributions "on the ability to seize, and the further ability, which is also consequent upon presence at a place, to take hostages for securing payment," Hall has confused a right with the sanction for its enforcement. According to international law, a belligerent has the right to exact contributions from the enemy under certain circumstances and subject to definite limitations, *if he can.* If his demands are not granted, he is entitled to punish in an adequate manner. The circumstances and conditions under which money can be levied on land have already been discussed. The ability to seize is not one of these conditions; it is merely an accident. In many cases, as, for example, where the people have buried their hoards, this "ability to seize" is non-existent, and

[1] Hall, 435 *et seq.*

the invader can only enforce payment through a threat of bombardment or some equally drastic punishment. An undefended place, which can be summoned by a land force and ordered to pay a sum of money on a real threat of bombardment, must necessarily be considered a place where the enemy's "authority is established and in a position to assert itself."[1] The case is the same as that of a torpedo-boat summoning an ocean liner to surrender and follow on the threat of being sunk, because the strictly limited equipment of the captor could never take effective possession of the prize.

The correct view appears to be that a naval force, though it may not be in a position to land, is entitled to demand from undefended localities money contributions for the same objects for which it can exact requisitions, *i.e.*, for the satisfaction of its immediate needs. These needs may be such as the locality itself could not satisfy. For example, a cruiser may require coal, which the locality may be unable to furnish, but which could be purchased from passing neutral ships or from some poor town in the neighbourhood, which could not, in justice, be burdened with the requisition. The levying of "fancy" ransoms, as well as the wanton destruction of property, which are forbidden to a land force, are equally forbidden to a naval force.[2]

[1] Hague Regulations, Art. 42.

[2] For the opposite view see Hall, p. 436.

Section IV.—*Property of Subjects of Neutral States in Territory under Military Occupation.*

Germany, supported by the United States and Switzerland, proposed at The Hague a set of rules that would have given a highly privileged position to the property as well as to the persons of subjects of neutral States resident on belligerent territory. These proposals were defeated by the determined opposition of Great Britain, France, Holland, Russia, and Japan, and the property of neutral subjects residing in hostile territory is now, as in the past, liable to the same burdens as that of the subjects of the enemy.[1] Neutral subjects are, as a matter of fact, often treated with a certain amount of consideration, but this is done purely as a matter of grace or from motives of policy.

During the invasion of France in 1870–1 the British Ministry admitted, on more than one occasion, that British subjects residing or owning property in the French Departments occupied by the Prussian forces were liable to the same obligations as Frenchmen. This, for example, was the reply given to the complaint of an English family, residing in the commune of La Ferté-Imbault, whose house had been occupied in spite of the Union Jack flying on the gateway.[2]

[1] Westlake, *International Law · War*, p. 284 *et seq.*, and p. 117 *et seq.* Hall, *op. cit.* p. 736. Bluntschli, *op. cit.* § 532. Kluber, *Droit des Gens moderne de l'Europe*, 2nd ed. by Ott (1874), § 286. *Opinions of the Attorneys-General of the United States*, XXII. p. 316.

[2] Calvo, *op. cit.* IV. § 2251.

The case of neutral property in transit through territory under occupation seems, however, to stand on a different footing. It is generally agreed that it must receive better treatment than the property of enemy subjects, but it is necessary to determine the extent of a belligerent's rights over it.

In this connection the so-called right of angary needs to be mentioned. According to Sir R. Phillimore, the *droit d'angarie* "is an act of the State, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the State, are seized upon, and compelled to transport soldiers, ammunition or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a Power with whom they are at peace." [1]

This right is disapproved by Hall, who, however, admits its existence.[2] It was exercised by the Germans on several occasions during the war of 1870–1, not only in respect of ships, but also of other movable property belonging to neutrals. Thus the German authorities in Alsace seized, for military purposes, several hundred wagons belonging to the Central Swiss Railway, a neutral company, and kept them for some time. About the same moment six English colliers passing through the Seine were sunk at Duclair to prevent French gunboats from going up the river.

The British Government did not dispute the

[1] Phillimore, *op. cit.* III. p. 50.
[2] Hall, *op. cit.* p. 737. See also Rivier, *op. cit.* II. p. 328.

existence of the right of angary in the latter case, but demanded compensation for the persons whose property had been destroyed. This claim had already been admitted by Count Bismarck.[1]

Art. 19 of The Hague Convention on neutral rights and duties provides that "railway material coming from the territory of neutral Powers, whether belonging to those Powers or to private companies or individuals, and capable of being identified as such, cannot be requisitioned or employed by a belligerent, unless in the case of and to the extent required by, absolute necessity. It shall be sent back, as soon as possible, to the country to which it belongs.

"The neutral Power may similarly, in case of necessity, keep and employ, in the meantime, material belonging to the territory of the belligerent Power.

"Compensation shall be paid, on either side, in proportion to the material employed and the duration of its employment."

Section V.—*Private Property belonging to Subjects of the Enemy State in a Belligerent's own Jurisdiction.*

We have seen that private property in territory under military occupation is, subject to certain exceptions, inviolable. What, however, is the

[1] Hall, *op. cit.* p. 738.

position of property, belonging to the subjects of the enemy, found within a belligerent's own jurisdiction ?

In one case the rule is strict in favour of exemption. Neither money lent by the subjects of the enemy State to a belligerent nor the interest accruing thereon can be confiscated.[1]

As to the other rights *in rem* or *in personam* which enemy subjects might own within the jurisdiction of a belligerent, opinion on the Continent of Europe seems to be in advance of Anglo-American Law. Fiore and Rivier hold private property on land, wherever found, to be inviolable.[2] Von Holtzendorff only permits weapons and objects directly useful in war to be sequestrated, while the war continues, to prevent them from reaching the enemy.[3] According to Wheaton, Phillimore, and Calvo, the strict law of nations permits the capture of all goods, but the first writer considers the rule reprehensible and the last obsolete, and only available as a means of reprisals.[4] Heffter says that private property belonging to hostile subjects, found in a belligerent country at the beginning of a war, cannot be seized, but if it comes into his hands after hostilities have commenced, it may be treated in the same way as the

[1] Hall, p. 437. Phillimore, III. p. 148. Fiore, II. ii. chap. vi. p. 311. Bluntschli, 658. Westlake, *International Law: War*, p. 39.

[2] Fiore, II. ii. chap vi. p. 306. Rivier, II. p. 318.

[3] Holtzendorff, IV. 116.

[4] Wheaton, *International Law*, 4th ed. by Atlay, § 300. Phillimore, III. p. 146. Calvo, IV. ii, §§ 1915, 1921,

property of enemy subjects in territory under military occupation.[1]

Finally, Hall allows that such property "enjoys a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and although seizure would always be looked upon with extreme disfavour it would be unsafe to declare that it is not generally within the bare rights of war."[2]

We will now proceed to consider the subject in greater detail, and more particularly from the standpoint of Anglo-American law and practice. For this purpose it will be necessary to divide the discussion into two parts. In the first place we shall have to consider what rights the fact of war confers upon a State in respect of the property of hostile subjects within its jurisdiction. Secondly, there is the question what alteration, if any, does the mere fact of war effect in the jural nature of such property independent of any interference by the local Sovereign.

(*A*) The property of enemy subjects may be of two kinds: (*a*) useful to the enemy in war, (*b*) not so useful. It is not likely that any but movable goods and chattels will fall under the former category.

There can be no doubt that if such goods are intended, or are likely to be of service to the enemy in his military operations—*e.g.*, ships (in cases not governed by maritime law), arms and ammunition, and even money—they may be sequestrated to

[1] Heffter, § 131. [2] Hall, p. 457.

prevent their reaching him. They must, however, be restored at the end of the war. There is no special right to *appropriate* such goods except the ordinary rights of a belligerent over the movable property in general of hostile subjects, which we will now proceed to discuss.

Immovable Property.—Down to the sixteenth century, not only the goods and chattels, but the immovable property of the citizens of the hostile State were confiscated. The humaner practice of seizing only the rents and profits of lands and houses began to gain ground in the seventeenth, and firmly established itself in the eighteenth century. Since the close of the Napoleonic wars, the only instance of interference with immovable property is furnished by the Confederate States in 1861, who confiscated it together with movables of every kind, excepting public stocks.

Although the modern custom of allowing the subjects of hostile States to continue to reside in the country during good behaviour, together with the practice, common to most States, of permitting aliens to acquire real property within their territory, has probably rendered the right of sequestration obsolete, yet the enjoyment of real property by enemy subjects is still subject to certain limitations, the natural consequence of the prohibition of commercial intercourse between enemies and an enemy's incapacity to sue. It must be borne in mind, however, that the latter restriction applies only to subjects of the enemy domiciled on hostile territory. An alien enemy

residing within a belligerent's jurisdiction may contract and sue like a citizen,[1] and the same indulgence will be extended to him if he has a known agent there authorised to collect his dues.[2]

Thus war will only *suspend* the right of an enemy lessor to sue for his rent, which peace will revive, just as it revives an executed contract.[3]

Movable Property.—Article 42 of Magna Carta promises that "... if they" (merchants) "be of the land at war against us, and if such shall be found in our land, at the beginning of war, they shall be attached without loss of person or property, until it be known by us or our chief justiciary how the merchants of our land are treated who are found then in the land at war with us; and if ours be safe there the others shall be safe here."[4] This provison was acted upon in a decision of the time of Henry VIII., and was extended, by the Statute of Staples (27 Ed. III. St. 2), from *domiciled* to *resident* aliens.[5]

On the same subject Blackstone says that "... It hath been said that anybody may seise to his own use such goods as belong to an alien enemy. ... But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorised by the public authority of the state, residing in the crown; and to such

[1] 2 Kent, *Com.* 63.

[2] Kershaw *v.* Kelsey, 100 Mass 561. *Scott's Cases*, p. 295. Here the case was of land situate on hostile territory, but the same principle would, it is conceived, apply to the converse case.

[3] See p. 57, *infra*.

[4] Stubbs, *Sel. Charters*, p. 301.

[5] Phillimore, III. p. 132.

goods as are brought into this country by an alien enemy, after a declaration of war, without a safe conduct or passport. And, therefore, it hath been holden, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seised."[1]

This exemption, it may be noted, does not protect in England the incorporeal rights of enemies resident abroad.

In Wolff *v.* Oxholm[2] (1817) Lord Ellenborough held that the "confiscation" of private debts due to an enemy is not in conformity with the law of nations.

The facts of the case were as follows:—Oxholm, a Dane, owed money in Denmark to the plaintiffs, British subjects. During the war the Danish Government confiscated the debt, and Oxholm, complying with the order, paid the amount of it into the Danish Treasury. Subsequently, when Oxholm arrived in England, he was arrested and a decree was passed against him. In the course of a long and elaborate judgment Lord Ellenborough, C.J., said "that the practice of Europe in refraining from the confiscation of debts had become so general that confiscation must be considered as a violation of the public faith. . . ." In the opinion of the Court the action of Denmark "stands single and alone, not supported by any precedent, nor adopted as an example in any other State."

[1] II. Black., *Comm.* ch. 26, p. 401. (Ed. of 1763.)
[2] 6 M. and S. 92.

The decision goes entirely against the previous American cases, to which neither Council nor Judge seems to have referred. As a precedent of the Law of Nations, at all events, it is not, it is submitted, of much weight, as, in enforcing in England a debt due in Denmark, which the Danish Government had barred, it violated an important principle of natural justice. "Perhaps if the occasion should present itself," says Phillimore, "the decision of Lord Ellenborough might be reversed in England. It was the decision of a single court, not much accustomed to deal with questions of International Law."[1] Wolff *v.* Oxholm was cited as an authority by Clifford, J., in Hanger *v.* Abbott (1867),[2] but the reference does not seem to be in point.

Dr. Lushington laid down in 1854 that "If the property was on land, according to the ancient law it was also seizable. . . . That rigour was afterwards relaxed . . . but no doubt it would be competent to the authority of the Crown if it thought fit."[3]

The Courts on the other side of the Atlantic have adopted what at first sight seems to be a different view of the law.

In 1777, on the outbreak of the American Revolution, the Virginian Legislature passed an Act confiscating all British goods. Sec. 3 provided "That it should be lawful for any citizen of Virginia, owing money to a subject of Great Britain, to pay the same or any part thereof, etc. . . . into the loan office,

[1] Phillimore, III. 857.
[2] 6 Wall., 532.
[3] The *Johanna Emilie*, Spinks, P.C., 14.

taking thereout a certificate for the same, in the name of the creditor, with the indorsement, under the hand of the commissioner of said office, expressing the name of the payer."

In Ware *v.* Hylton (1796),[1] a case under this Act decided by the Supreme Court, the following *obiter dictum* fell from Chase, J., and was reluctantly endorsed by two other Judges: "It appears to me that every nation at war with another is justified by the general and strict law of nations to seize and confiscate all movable property of its enemy (of any kind or nature whatever) wherever found, whether within its territory or not." Wilson, J., however, in the same case, terms the "confiscation of debts disreputable."

In Brown *v.* The United States,[2] Marshall, C.J., held: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded."

Chancellor Kent thus sums up the American case law on the subject: ". . . However strong the current of authority in favour of the modern and milder construction of the rule of international law on the subject, the point seems to be no longer open for discussion in this country; it has become definitely settled in favour of the ancient and sterner rule, by the Supreme Court of the United States."[3] And again, "the right of a belligerent to confiscate the debts of the subjects of his enemy during war" may

[1] 3 Wall., 199. [2] 8 Cranch, 110.
[3] Kent's *Comm.* I. i. 13.

therefore be considered a "naked and impolitic right, condemned by the enlightened conscience of modern times." [1]

Only two instances of the exercise of the right of confiscation are to be found in the history of the nineteenth century. In each one of these there were special circumstances that make them unimportant as precedents.

1. In 1807 the Danish Government seized all the debts and goods of British subjects found within its territory. This was really not a case of confiscation, but of retorsion, justified by the gravest provocation to an unoffending nation. In time of peace, the British fleet had swooped upon the Danish ships of war and made them its prey, and when, in consequence, war broke out, an Order in Counci condemned all the Danish vessels found within British waters as droits of admiralty.

2. The second instance occurred in 1861, when the Confederate States confiscated all "property of whatsoever nature, except public stocks and securities, held by an alien enemy since 21 May, 1861." [2]

This was not the act of a regularly constituted State, but of a belligerent community in great straits, inclined to strain to the utmost every right of war The position of the belligerent community in the family of States is like that of a person who is merely tolerated in polite society. His existence is recognised as being inevitable, but he cannot by his acts set a new fashion or revive a dying one.

[1] Kent's *Comm.* I. i. 13. [2] Hall, p. 440.

Lord Russell wrote on the Act of Confiscation: "Whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilised times are so rare and have been so generally condemned that it may almost be said to have become obsolete."[1]

The opinions of international jurists and the leading authorities of Anglo-American case law on the subject have now been considered. It is worthy of remark that none of these cases are of recent date, and that even a century ago the Judges would not admit, save with the utmost reluctance, the existence of this "naked and impolitic right."

What is the present rule of law? Will the conscience of civilised mankind permit a return to what appeared even to the rough Barons who extorted the Great Charter from King John to be too harsh a system, or is the private property of the citizens of the hostile State to remain inviolable within a belligerent's jurisdiction as it practically is in hostile territory under military occupation?

The enormous improvement in the means of communication, and the increased sense of solidarity amongst civilised nations, have made a return to the older principle impossible. Commerce and social movements tend more and more to be international, and the money market has become so already

[1] Hall, p. 440, note.

There are few nations whose citizens do not possess large stakes in almost every quarter of the globe, and every important country nowadays has a considerable floating population of foreigners at all seasons. The tourist and the merchant are welcomed everywhere as importers of wealth, and the shopkeepers of Italy and France would be disconsolate if deprived of their Anglo-Saxon visitors and their gold. A State that plunders its guests would be killing the goose that lays the golden eggs.

Both reason and authority justify the conclusion that the property of enemy subjects found within a belligerent's jurisdiction cannot be captured as an ordinary measure of war. The sovereign may seize it as an act of retorsion for injury done to his own subjects or as a punishment for a breach of international law by his enemy.

There appears to be really no discrepancy between the dicta of the English and of the American judges. The cases cited must be taken to lay down no more than a rule of constitutional law, and to go no further than this: that in England the Crown has an ample prerogative in this matter and can act independently of Parliament; and that under the constitution of the United States Congress may authorise the President to exercise the same power.

There is no essential difference between this and the law as understood on the Continent of Europe, seeing that the latter admits the doctrine of "necessity" in peace and war, which justifies exceptions to the most fundamental rules of law.

"Necessity" is unknown to the Common Law.[1] Hence it is proper for the safety of the State that the law should expressly recognise the exceptions to which the general rule of inviolability is subject.

War, therefore, gives the right to confiscate but does not of itself confiscate the property of an enemy.[2] A class of cases will now be considered in which the mere fact of war affects his proprietary rights.

(*B*) It is a well-established principle of the law that war suspends all commercial relations between the subjects of the belligerents. All contracts made by the subjects of a State with the subjects of a State at war with it, unless covered by a public licence, are null and void *ab initio*. "In the law of almost every country, the character of an enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. . . . If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for the purpose, can there be a stronger proof that the law imposes a legal disability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole transaction is attempted without its protection and against its authority."[3]

The case of obligations that have come into

[1] *Cf.* Reg. *v.* Dudley and Stephens, L.R. 14 Q B.D. 273.

[2] Per Marshall, C.J., in Brown *v.* U.S., *supra*.

[3] Sir W. Scott in the *Hoop*, 1 C. Rob. 196. An exceptional practice has, however, been admitted in the case of bills drawn by prisoners in the enemy's country on their fellow-subjects and endorsed in favour of subjects of the enemy. The latter can sue on them on the return of peace. Antoine *v.* Morshead, 6 Taunton, 237.

existence before the war is different. They are *property*, and are affected in a special manner by the state of hostilities.

The general rule is that the remedy on obligations *ex contractu* or *ex delicto*, as between persons who become enemies, is suspended, but revives on the return of peace. Limitation does not run during the war.[1] On the other hand, though the principal of a debt survives, interest, even if agreed upon, will not run whilst hostilities continue,[2] except "when an agent appointed to receive the money resides within the same jurisdiction with the debtor"[3] or "when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor."[4]

In certain cases, however, war annuls obligations.

(1) Contracts, executed or executory, between persons who become enemies are dissolved by the war if time is of their essence, and provided the contracts involve trade or intercourse between the parties during the war.

A policy of life-insurance with periodical premiums is an *executory* contract of this nature. If any of the premiums fall due during the war, the contract of assurance is held to have been dissolved at the moment war broke out, but on the conclusion of

[1] Hanger *v.* Abbott, 6 Wall., 532. *Ex parte* Boussmaker, 13 Ves. Jun. 71.

[2] Hoare *v.* Allen, 2 Dall. 102.

[3] Ward *v.* Smith, 7 Wall., 452. The agent must have been appointed before the war. U.S. *v.* Grossmayer, 9 Wallace, 72.

[4] Paul et ux. Extx. of Dean *v.* Christie, 4 Harris and McHenry, 161.

peace the assured can recover the surrender value of the policy at the time of its determination.[1]

To take the case of an *executed* contract, a man who loses his dog offers by advertisment half a pound out of his Christmas pudding on Christmas Day, 1907, to anyone who will bring the animal safe home; a Russian subject, knowing of the offer, brings the dog safe home on the 1st January, 1907. On the 2nd of January following, war breaks out between England and Russia. If the war lasts till the 31st December, the contract will be annulled. If, on the other hand, peace is concluded on, say, the 20th December, the contract will not be affected.

(2) Contracts the fulfilment of which during the war will give the enemy aid or comfort in the prosecution of the war cannot be enforced on the return of peace. Thus it was held that a British underwriter on French property in time of peace is not liable for a loss occasioned by capture by the British fleet during hostilities which commenced between Great Britain and France after the policy had been effected.[2]

(3) On the outbreak of war, all commercial partnerships existing between the citizens of the hostile States are *ipso facto* dissolved.[3] War implies a cessation of all commercial relations between the citizens of the contending States, and agreements

[1] N.Y. Life Ins. Co. *v.* Stathem, 93 U.S. 24.
[2] Gamba *v.* Le Mesurier, 4 East, 407.
[3] Griswold *v.* Waddington, 15 Johns, 57.

like partnerships, that necessarily involve continual intercourse, cannot stand.

On the principles laid down by the Supreme Court in New York Life Ins. Co. *v.* Stathem,[1] however, it is conceived that on the return of peace the alien partner would be entitled to sue for the value of his share in the partnership at the moment it was dissolved.

Negotiable instruments, and in particular bills of exchange and promissory notes, and so also acceptance, indorsement, and acceptance supra protest of bills of exchange, are contracts in writing,[2] and are therefore governed by the general rules as to written contracts. An enemy holder can no more sue on a bill of exchange than on any other contract, but it is conceived that if he negotiates the bill to a neutral, even during hostilities, the latter could sue on it in his own name. It would, of course, be open to the enemy holder to wait till the end of the war before presenting a bill payable after sight for payment or, in the case of a bill not payable after sight, for payment or acceptance. The duration of the war would no doubt be "a reasonable time" within the meaning of §§ 40, 41, and 45 of the Bills of Exchange Act. The holder would not, however, be entitled to any damages for dishonour or non-acceptance beyond the amount of the bill, nor would interest run whilst the war lasted.[3]

Any contract on a bill of exchange between

[1] *Supra.* [2] Foster *v.* Jolly, 1 C.M. and R. 703.
[3] Hoare *v.* Allen, 2 Dall. 102.

enemies, effected during the war, is of course void, and a holder with notice, even if otherwise capable of suing, will not be a holder in due course under § 29 of the Bills of Exchange Act.

"A cheque is a bill of exchange drawn on a banker payable on demand" [1] and is affected by war in the same manner as any other negotiable instrument.

To cross a cheque with the name of a banker is in effect a direction to the drawee to pay the cheque to that banker only, as the holder's agent, with the rider that payment is not to be made to the holder personally. Whether, therefore, a crossed cheque held by an enemy can become the basis of an action during war is a question which must, it is conceived, be primarily determined by the status of the bank whose name is written across the cheque and not of the holder. We have here what is clearly an inchoate agency "to collect and preserve but not to transmit money or property," [2] and the same principles apply as in the case of other contracts of agency.

Section VI.—*The Effect of War on Corporations.*

It now remains to deal with the effect of war on the corporation, an institution which is something more than a mere contract of partnership, though, like the latter, it originates in agreement.

[1] Bills of Exchange Act, 1882, § 73.

[2] These are the words of Burke, J., in Small's Admr. *v.* Lumpkins' Exx. et als. decided by the Court of Appeals of Virginia in 1877. 28 Grattan, 832. *Scott's Cases*, p. 538.

The subject will be considered—

(1) from the point of view of the corporation itself;

(2) from the point of view of its members.

It is settled law that a corporation is a juristic person. It is an entity independent of the aggregate of its members and has a legal character and existence of its own. It partakes, however, of the nature of a partnership as well as of a natural person.

"The domicile of a corporation is the place considered by law to be the centre of its affairs, which—

"(1) in the case of a trading corporation is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on,

"(2) in the case of any other corporation, is the place where its functions are discharged." [1]

A company—the most familiar form of a corporation—will be fixed with a hostile or friendly character by its *domicile* without reference to the nationality of the shareholders.

The outbreak of hostilities dissolves commercial partnerships between enemies, because—

(1) A state of war involves the cessation of all commercial intercourse—the essence of a partnership—between the subjects of the belligerents.[2]

[1] Dicey, *Conflict of Laws*, 2nd ed. p. 160.
[2] Griswold *v.* Waddington, 15 Johns, 57.

(2) A partnership could not be suspended, since it would be impossible to pick up its threads again on the return of peace.

These considerations do not as a rule apply to corporations, because it is quite possible for the members of a hostile limited liability company, for example, to abstain from all interference with its affairs so long as hostilities continue, without doing themselves or the company any harm.

It follows, therefore, that, as a general rule, war will not affect the existence of corporations at all.

Circumstances can, however, arise under which the dissolution of a company would be inevitable—

(1) In a company with 997 shares A and B hold 496 shares each and the remaining five shares are held by five nominal partners. War breaks out and A and B become enemies. Here the analogy with a partnership is too close for the company to continue to exist. It will have to be wound up, the shares of the enemy shareholder being reserved.

(2) It is conceived that in the above case the company would cease to exist in England even if one of the nominal shareholders became an enemy, as there would no longer be seven members to keep it alive.[1] The Companies Act must be taken to mean that each one of the minimum number of seven shareholders essential in a company must be an effective shareholder.

[1] *Cf.* 25 and 26 Vict. c. 89, § 48

(2) *The Shareholders.*—The rights of the shareholders in respect of a company are not *jura in personam*, but rather *jura in rem.* The members as such have a status which entitles them to certain benefits: they are not the mere promisees in a contract.

This distinction has an important bearing on the subject in hand.

(*a*) An enemy does not *ipso facto* cease to be a shareholder any more than an enemy proprietor of immovable property is divested of his estate. War has the same effect on dividends that accrue as it has on the rents of lands and houses becoming due to an enemy.[1]

(*b*) The position of a director involves continual commercial intercourse with his colleagues. An enemy would, therefore, *ipso facto*, cease to hold this office, though he would of course continue to be a shareholder.

(*c*) Where, however, a person cannot cease to be a director without ceasing to be a shareholder as well, he will drop out of the company altogether but he will retain a lien on the equitable value of his share at the outbreak of the war.

(*d*) War will rescind allotments of shares to enemies, but a company's claim to outstanding calls on a share already allotted will not, it is conceived, abate unless the calls fall due whilst the war continues. If such is the case, the

[1] *Vide* p. 43, *supra.*

contract to take the share will be dissolved, with effect from the beginning of the war, and the applicant will be entitled to a return of the earnest money and the equitable value of all calls paid to date.

Debentures are merely loans contracted by companies, and are affected by war in exactly the same manner as ordinary debts.

CHAPTER II

EFFECTS OF CONQUEST ON PROPERTY

SECTION I.—*General*

THE complete conquest of a State, in whole or in part —the distinction between conquest and mere military occupation must be kept in mind—gives rise to many important questions of public and private rights of property in their active and passive aspects.

Thus one may ask :

(1) Whether conquest confers on the victor the corporeal and incorporeal property of the conquered State both within and without the latter's jurisdiction ?

(2) What is the effect of conquest on purely private rights of property ?

(3) What is the effect of conquest on the rights of individuals against the extinct State arising from obligations ?

(4) What is the effect of conquest on rights of a mixed public and private nature ?

The first two cases can be disposed of without much difficulty.

(1) The rights of a conqueror could hardly be

better expressed than in the words of Vice-Chancellor James in U.S. *v.* McRae :[1]

"I apprehend it to be the clear public universal law, that any Government which *de facto* succeeds to any other Government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced Power, whatever may be the nature or origin of the title of such displaced Power. . . . But this right is the right of succession, is the right of representation, is a right not paramount but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced, and was itself seeking to enforce it."

(2) Conquest does not disturb the private rights of property of the citizens of the conquered territory. "It is very unusual even in cases of conquest for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowleged and felt by the whole world would be outraged, if private property should be generally confiscated and private rights annulled."[2]

An attempt has been made to draw a distinction between the effects of conquest and of cession.[3]

[1] L.R. 8 Eq. 75. See also U.S.A. *v.* Prioleau, 2 H. and M. 563. King of the Two Sicilies *v.* Willcox, 1 Sim. N.S. 327.

[2] U.S. *v.* Percheman, 7 Peters, 51. See also U.S. *v.* Moreno, 1 Wall., 400. Chi. and Pacific Ry. Co. *v.* McGlinn, 114 U.S. 546.

[3] W. Rand Central Gold Mining Co. *v.* Rex, L.R. (1905), 2 K.B. on p. 411.

However that may be in the domain of constitutional law, it is conceived that according to the law of nations private property is equally sacred in either case.

(3) The subject of the rights of property consisting in the obligations of the displaced State is not an easy one, especially as Anglo-American case law does not throw much light on it. Cook *v.* Sprigg[1] and West Rand Central Gold Mining Co. *v.* Rex[2] decide questions of constitutional rather than of international law and are not authorities in the latter except in so far as they define the debatable line between the two. These cases have been adversely criticised, but, it is submitted, unjustly so. In leaving the decision of all the mixed questions of "propriety, magnanimity, wisdom, public duty, in short, of policy in the broadest and widest sense of the word," that arise on conquest, to the Crown, the Courts have wisely recognised the limitations of the English law of evidence and procedure.

The fate of the various obligations of the conquered State has now to be considered in the light of custom and reason. What, for example, becomes of the Public Debt, and of loans contracted for carrying on the war which ended in the conquest? In a country where rivers belong to the State concessions may have been given to work them for electric power. There are also to be considered the claims of the pensioners of the former State, of holders of postal

[1] L.R. (1899), A.C. 572.
[2] L.R. (1905), K.B.D. 391.

orders, and of depositors in State savings banks. The farmer whose horse was requisitioned for the war by the conquered State will seek redress.

These obligations are often spoken of as if they were all on the same plane, but it will appear on investigation that very different principles apply to their various classes.

Different theories have been advanced on the nature of the succession of State to State. Grotius, assimilating it entirely to the succession of Civil Law, lays down that "with regard to the continuation of ownership, both public and private, it is undoubted law that the person of the heir should be regarded as one with that of the deceased." [1]

Others, like Max Huber and Professor Westlake, consider that "the notion of succession is a general one in law, and belongs exclusively neither to private nor to public law," and they proceed to distinguish the civil successor who steps into the rights and obligations of his predecessor, as if he were himself the predecessor, from the successor of international law, who steps into them as if they were his own.[2]

As a matter of fact, the modern State is a complex organism, fulfilling diverse functions. It is one and indivisible, yet it can be looked at from different points of view, which, though often confused and indistinguishable, are yet capable of being analysed in the same manner in which we can analyse the

[1] Grot. L. II. c. ix. § 12.

[2] Westlake in L.Q.R. (1901), XVII. p. 396, citing Huber, *Die Staatensuccession*, § 23.

physical, the intellectual, and the spiritual aspects of man. In order to understand what becomes of the obligations of an extinct State, it is necessary to distinguish between its various aspects.

A State can be regarded as:

(1) A sovereign of international law.

(2) The political sovereign within its territory.

(3) The jural sovereign within its jurisdiction.

(4) A private corporation within its own jurisdiction.

Section II.—*The State as a Sovereign of International Law.*

In this capacity it has dealings with other independent States, and makes war and peace, and enters into treaties and alliances. This is the purely personal aspect of the State and, as such, it disappears with all its rights and obligations on conquest. Commercial treaties, alliances, and agreements that have not become a part of the public law of the community of nations are dissolved. There is, in short, no succession to international sovereignty at all.

For example, under a treaty with the British Government, the Amir of Afghanistan is paid an annual subsidy by the Indian treasury. The claim to this subsidy is a right of property. If Russia conquered Afghanistan, however, she would not become entitled to it.

SECTION III.—*The State as Political Sovereign.*

As such it holds the *Eminent domain* or the *Imperium* over its territory and is entitled to the allegiance of its citizens. It controls the public forces and administers the taxes, police, jails, and other like institutions. It also owns the public lands.

It is possible for a State to have political sovereignty and yet not be a sovereign of international law, and *vice versa*. Such, indeed, is the case of the Austro-Hungarian Empire—a sovereign of international law without political sovereignty, which is vested in its constituent States of Austria and Hungary.

The conqueror succeeds to the political sovereignty of the conquered State in so far as he is substituted for the latter and continues its personality. As distinguished, however, from the successor of civil law, the new State steps into the rights and obligations of his predecessor as if they were his own.[1] "As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new Government are at once displaced. Thus upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the Press, or authorising cruel and unusual punishment, and the

[1] Westlake, *Int. Law*, I. 69.

like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new Government upon the same matters." [1]

Thus fiefs, monopolies of sale, and rights of patronage, perish in case the successor State does not possess corresponding institutions.[2] Acting on this principle, the Government of the United States refused to entertain the claim of the Countess of Buena Vista for damages, on her being deprived of the hereditary office of High Sheriff of Habana on the occupation of Cuba—which was really a conquest by the American forces—since hereditary public offices are repugnant to the institutions of the United States.[3]

On the other hand, the conquerer will be liable for all pension charges, both civil and military, except sums due to persons in public employ who were actually in arms against him. Similarly, all obligations for contracts made in the ordinary course of business will pass to the successor. To take a concrete case: the tailor who prepared uniforms for the police under the late Government will be entitled to payment.

The Public Debt.—There is much controversy as to the fate of the public debt of the annexed State.

[1] Chi. and Pacific Railway *v.* McGlinn, 114 U.S. 546. See also Pollard's Lessee *v.* Hagan, 3 How. (U.S.) 212, on p. 225.

[2] Westlake, *Int. Law*, I. 82.

[3] Magoon, *Civil Government in Territory under Military Occupation*, p. 194 *et seq.*

Despagnet,[1] von Holtzendorff,[2] Bluntschli,[3] and Calvo[4] affirm unconditionally the conqueror's liability for the debts of the extinct State. On the other hand, this doctrine has often been denied. "We desire," say the judges in West Rand Central Gold Mining Co. *v.* Rex,[5] "to consider the proposition that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained."

There can be little doubt, however, that, as a general rule, the conquering State is liable for the public debt of its predecessor, subject to certain exceptions.[6]

(1) The annexing State cannot be held liable for the debts incurred by the annexed State for the immediate purpose of war against itself. We have seen that the conqueror succeeds to his predecessor's obligations as if they were his own, but it would be absurd to hold him liable for debts contracted for his own destruction, which, of course, he would himself never have incurred.

The question arises whether claims against a State for the exaction of requisitions or the destruction of property without the owners' consent, or on contracts in the way of business but connected with the war, devolve on its successor.

[1] *Droit Int. pub.* § 93.
[2] *Handbuch*, II. § 11.
[3] §§ 50, 54.
[4] IV. L. viii. §§ 2478, 2487.
[5] L.R. (1905) 2 K.B. 391, on p. 402.
[6] Westlake, *International Law*, I. 75. Transvaal Concessions Commissioners' Report, p. 7.

Professor Westlake admits the liability, citing the authority of the Italian cases that arose on the annexation of Lombardy and Venetia by Italy in 1860.[1]

It is submitted that this view is not correct, since the question of the validity of a debt incurred for carrying on the war ought to be referred, not to the consent or otherwise of the lender, but to the general principle whether the conqueror would himself have incurred this debt. It is clear that he would never have done so.

As a matter of fact, the laws of many countries expressly make their non-combatant population liable to requisitions without payment for the national armies.

There is no valid reason for distinguishing, from the point of view of international law, between loans, taxes, contributions, and requisitions for carrying on a national war. The citizens must be held bound to help the State in its death-struggle with their all, without acquiring a *legal* right to indemnity.[2] It may, of course, be politic for the conqueror to conciliate his new subjects, but this is quite a different matter.

(2) "No State would acknowledge private rights the existence of which caused or contributed to cause the war which resulted in annexation."[3]

(3) A solvent State is not bound to take over

[1] *International Law*, I. 79.

[2] This was the view adopted by the British Colonial Office on the termination of the South African war (*vide Times* of 3rd April, 1903: Questions not answered orally). See also Rouard de Card; Bluntschli, § 662.

[3] Transvaal Concessions Commissioners' Report, p. 7.

the whole of the obligations of a bankrupt State on annexation. There is no reason why the mere fact of annexation should convert the latter's worthless securities into valuable ones. It is true that it is difficult to calculate exactly a nation's assets, but there must be some limit to the successor's liability.

Professor Westlake's[1] view, that, if the annexed territory is incorporated in the annexing State its debt will be merged in that of the latter, seems to be the correct one.

On the other hand, if the conquest is maintained as a separate unit, *i.e.*, "if there is a distinct and independent civilised Government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such Government rather than the central authority should respond out of its separate assets to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future. It does not matter what is the exact nature or extent of the connection between the principal State and the dependent possession, so long as the latter possesses its own organised Government, and is not a mere unorganised dependency. . . . The crucial test is the separated and autonomous Government and not the attribute of sovereignty."[2]

[1] *International Law*, I. 77.

[2] Opinions of the Attorneys-General of the United States, Vol. XXII., pp. 585–587.

Thus when Texas, an independent republic, was absorbed in the United States, it ceased to have a separate *fiscal* existence though it remained an administrative unit, "potent and capable within its territorial limits." Under the circumstances, the United States properly maintained that the debt of the extinct republic was a charge on Texas alone. It is true that by the absorption Texas lost her separate revenue from customs duties, but her customs were not as it were an asset taken over by the United States *cum onere*. The fiscal system of Texas was an institution of a political character repugnant to the Constitution of the United States and, *ipso facto*, disappeared at the annexation without leaving any obligation on the latter.[1]

Similar principles apply when a part only of a State changes masters. All local obligations must be taken over, together with a proportionate part of the public debt.

On this point, the series of treaties made by the great Powers of Europe concerning the Ottoman Empire—not unjustly said to form together a sort of *corpus juris publici orientalis*[2]—furnish important precedents which deserve special notice. The Convention of 1881 provided that Greece should take over a part of the Ottoman public debt in proportion to the extent of Turkish territory that was to

[1] For the contrary view see Westlake, *International Law*, I. 77.

[2] Holland, *The European Concert and Eastern Question* (1885), p. 2. *Ibid.* p. 65, Art. X. of the Convention of 1881.

be ceded to her. The debt was similarly apportioned when the kingdom of Bulgaria was set up [1] and slices of territory given to Montenegro and Servia.[2]

SECTION IV.—*The State as Jural Sovereign.*

Law—and by this term is understood private law—is the conscience of the community, the abstract conception of the relations of the citizens between themselves. From the standpoint of the jurist the State is the centre towards which gravitate the rights of individuals: it is the State that directs the harmonious movement of each in his appointed sphere of duty.

As distinguished from the first two cases, the conqueror takes over the jural sovereignty of his victim in the same way as a civil heir succeeds to the deceased. Rights and obligations are taken over by the new State as if it were the old. "The King never dies" is a legal maxim that applies to the sovereign's death in international as well as in municipal law. It really means no more than that civilised society never dissolves into anarchy, but that there is always a fountain-head to which the laws can be referred. "The laws of a conquered country," therefore, "continue in force, until they are altered by the conqueror." [3]

This principle is not without importance in the the law of property.

[1] Holland, *The European Concert and the Eastern Question* (1885), p. 284, Art. 9 of the Treaty of Berlin (1878).

[2] *Ibid.* pp. 297 and 301, Arts. 32 and 42 of the same Treaty.

[3] Per Mansfield, C.J., in Hall *v.* Campbell, 1 Cowp. 204, on p. 209. See also Chi. and Pacific Ry. Co. *v.* McGlinn, 114 U.S. 546.

(1) All unexecuted decrees and judgments given by the displaced sovereign will be valid and enforceable under the new *régime* even if they are in conflict with the policy of the letter.

(2) In certain instances a State may be said to become indebted in its jural aspect; *e.g.*, when it serves as a conduit-pipe for conveying property from a person not entitled to it to the person to whom it is due.

Thus the Indian Penal Code[1] authorises a magistrate to award a portion or the whole of a fine in a criminal case to the complainant by way of compensation. The sum so awarded must remain in deposit in the Government Treasury until the period of appeal expires. These deposits are obligations which a successor of international law would be bound to discharge.

Section V.—*The State as a Private Corporation.*

Lastly, the State may also have the position of a private, though it may be a privileged, corporation within its own jurisdiction. In this capacity it administers the post and the telegraph, savings banks, and State railways. It may carry on various industries; *e.g.*, grow fruit or manufacture quinine.[2]

In this capacity a State is not extinguished at all by the conquest. There is no death and no succession. The new State merely takes the place of the old

[1] § 250.

[2] As is done by the British Indian Government.

in the same manner as one set of directors take the place of another set in a trading corporation. The position of depositors in a State savings bank, for example, is no more affected than if it were a private institution. Postal money-orders, claims on insurance of registered articles, claims for damages for non-fulfilment of agreements in the State Industrial Department will enjoy the same privilege.

Section VI.—*Concessions.*

Special mention must be made of concessions, which involve questions of great moment to industrial and financial circles.

A concession has been defined as "a grant made by a central or local public authority to a private person or persons, for the utilisation or working of lands, an industry, railway, water-works, etc."[1]

Concessions may be of three kinds:

(1) Those involving the permanent alienation of the public domain, such as concessions to work mines.

(2) Those involving the use of the public domain, on payment or otherwise, such as concessions to use a river for generating electric power.

(3) Concessions for public works, whereby an individual undertakes to execute works of public utility, recouping himself not through payment by the public authority but by the collection of fees from the persons benefiting by the works.

[1] *Encycl. of the Laws of England*, Art. Concession.

A conqueror may cancel concessions the grant of which was:

(1) *Ultra vires.*

(2) A breach of a treaty with the annexing State.

(3) Obtained unlawfully or through fraud.

(4) Conditional, the essential conditions remaining unfulfilled without lawful excuse.

(5) Further, the concession may be cancelled if its continuance is against the public interest.[1] In this case, however, the persons interested will have to be paid such compensation as the conquering State awards on expropriating its own concessionaries.[2]

Whenever the conqueror recognises a concession, he is entitled to impose such conditions as his own public policy may suggest. Thus, the Transvaal Concessions Commissioners recommended the confirmation of the Pretoria market concession, but suggested that special arrangements should be made for its control, as, in their opinion, "that part of the agreement by which the management of the market is entrusted, subject to no practical check or control, to a private company, is contrary to the public interest."[3]

[1] Transvaal Concessions Commissioners' Report, p. 8.
[2] Westlake, *International Law*, I. p. 83.
[3] Transvaal Concessions Commissioners' Report, p. 113.

CHAPTER III

THE PROPERTY OF ENEMIES AND NEUTRALS AT SEA

THE effects of war on the property of the subjects of neutral States and of the enemy are many and important. The declaration of hostilities in many cases converts what would usually be considered neutral into hostile property, and further effects certain changes in the status of hostile property itself.

The question will best be investigated under the following headings:

(1) Who are enemy persons?
(2) What are enemy ships?
(3) What is enemy cargo?
(4) What are the effects of enemy character?

SECTION I.—*Who are Enemy Persons?*

I. *Domicile.*—In England and the United States of America the domicile of a person almost invariably decides whether he is hostile or neutral: if he is domiciled in the enemy's territory he is considered an enemy;[1] if in that of a neutral State, a neutral.[2]

[1] *Ind. Chief*, 3 C. Rob. 12.
[2] Danons, 4 C. Rob. 255 n.

It is, therefore, important to consider what constitutes domicile.

"For belligerent purposes a person may be said to be domiciled in a country when he lives there under circumstances which give rise to a reasonable presumption that he intends to make it his sole or principal place of residence during an unlimited time. If a person goes to a country with the intention of setting up in business he acquires a domicile as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently. If, on the other hand, he goes for a purpose of a transitory nature, he does not necessarily acquire a domicile, even though he lingers in the country after his immediate object is satisfied. He only does so if at last by the length of his residence he displaces the presumption of merely temporary sojourn which is supplied by his original purpose." [1]

Of the two elements of time and object "time," says Lord Stowell, "is the grand ingredient in constituting domicile. . . . In proof of the efficacy of mere time it is not impertinent to remark that the same quantity of business which would not fix a domicile in a certain space of time would nevertheless have that effect if distributed over a larger space of time. Suppose an American came to Europe with six contemporary cargoes of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation with a great preponderance on the article of time. Be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicile." [2]

The intention to settle in the enemy's country accompanied by overt acts is sufficient to fix a person

[1] Hall, p. 497.

[2] The *Harmony*, ii. Rob. 322.

with hostile character. Thus a British merchant who landed on the island of St. Eustasius a day or two before its capture by Admiral Rodney was held by Lord Stowell to have become an enemy.[1] An acquired domicile may be abandoned at will.

"The character that is gained by residence ceases by residence: it is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*."[2]

A mere intention of leaving is not enough, but some overt act must be performed to manifest it.[3]

Merchants and others residing in Eastern countries furnish a special case. These are supposed to reside abroad under the protection of their consulates and do not acquire the domicile of the country. Accordingly, a Dutch merchant residing at Smyrna was held to have remained a Dutch subject and his property was condemned.[4] Similarly, a Jew attached to a Dutch factory in the territory of the Raja of Cochin (India) was considered to be a Dutchman and not a domiciled subject of Cochin.[5]

[1] The *Diana*, 5 C. Rob. 67.

[2] Snow, p. 318.

[3] The *Indian Chief*, 3 C. Rob. 12.

[4] Wildman, *International Law* (1850), II. p. 42.

[5] *Ibid.* According to the French rule, Nationality and not Domicile determines the character of an individual. The doctrine has certainly the merit of simplicity, though less justifiable in theory than that of the English Courts. (Le *Hardy* contre le *Voltigeante*, Pistoye et Duverdy, *Traité des prises marit.* (1859), I. p. 321-327. Le *Joan*, Barboux, *Jurisprudence*, p. 104.)

Denmark seems to have adopted the French doctrine (*Nouv. Rec. Gén.* I. p. 496, Art. 11, 1°), whereas Japan, during the Russo-Japanese war, followed the English rule, R.D.F.P. (1905), p. 613.

Effects of military occupation on domicile.—A distinction must be made between an occupation with the ultimate object of conquest and that which is a mere temporary operation of war. The mere fact that the enemy is in possession of a certain place will not make it hostile or its inhabitants enemies. The distinction, which is apparently not recognised by Hall,[1] was established in the case of the *Gerasimo*,[2] a Moldo-Wallachian ship captured by an English cruiser in 1854. The captor had taken no steps to obtain an adjudication of the prize when in 1855 the proprietors sued for its restitution. On behalf of the defendants it was pleaded that Moldavia, where the proprietors were domiciled, was, at the moment the *Gerasimo* set out to sea, occupied by the Russian forces, and that this was sufficient to fix them with the character of enemies. The Privy Council, reversing the judgment of the Court of Admiralty, ruled that, taking into account the character, duration, and results of the Russian occupation of Moldavia, it was impossible to hold that Moldavia had ever become incorporated in the Russian Empire or that its inhabitants had ever become the subjects of Russia and the enemies of Great Britain. The sole result of the occupation was a temporary suspension of the suzerainty of the Porte and this could in no way alter the national character of the territory. Russia had disavowed all intentions of conquest and continued to recognise the Moldo-Wallachian flag.

[1] Hall, p. 508.

[2] 11 Moore, P. C. 115.

Where military occupation has been made with a view to annexation, the inhabitants of the territory are considered enemies and their property at sea is liable to condemnation. Thus in Bentzen *v.* Boyle, Marshall, C.J., said that:

"Although acquisitions made during war are not considered as permanent until confirmed by a treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them."[1]

There seems to be little doubt that in the converse case, *i.e.*, where a belligerent is in military occupation of a part of the enemy's territory, persons domiciled therein will be considered friendly and their property at sea exempted from condemnation. Such a case has not yet come before the courts. Hall seems to be mistaken in saying[2] that Lord Stowell ruled in a contrary sense in the *Dankbaar Afrikaan*,[3] for that decision went on entirely different grounds. This was a vessel belonging to merchants domiciled in the Cape of Good Hope which had started on its voyage before, but was captured after, the British conquest of the Cape. It was condemned on the sole ground that as it had sailed a Dutch ship its character could not be altered *in transitu*. The rule that disregards transfers of ownership *in transitu* was justified by Lord Stowell by the necessity of checking fraud. The extension of the doctrine to an involuntary

[1] 9 Cranch, 191. [2] Hall, p. 509. [3] 1 Rob. 107.

change of character where fraud was out of the question was unjustifiable.[1]

II. *Identification with the enemy.*—A neutral subject who takes permanent employment, civil or military, in the service of the enemy, is considered an enemy for all purposes. If he contracts to perform specific services, he is held to be hostile to the extent of such services.[2]

Persons who are habitually engaged in certain other professions under the enemy's flag, such as that of captain, sailor, supercargo, are properly considered to be enemies.[3]

Section II.—*What are Hostile Ships?*

All ships belonging to enemy persons, as defined in Section I., are considered hostile in time of war.[4]

The ownership of a vessel, however, is not the only element determining its character. Every ship carries a national flag, the right to which is regulated by different rules in different countries. None but British-owned ships can fly the Union Jack, while the

[1] "In a State war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*; and in that sense I recognise it as the rule of this Court." *Vrouw Margaretha*, 1 C. Rob. 336.

[2] Hall, p. 501.

[3] Calvo, IV. ii. § 1945.

[4] *Admiralty Manual of Prize Law* (Holland), p. 6.

Colombian Flag may be carried by ships manned and owned entirely by foreigners through simple registration in Colombia.[1]

According to the English rule, all vessels sailing under the flag and pass or licence of the enemy by whomsoever owned are good prizes.[2] It will make no difference whether they are owned in part or entirely by neutral subjects.[3]

This rule may cause hardship in individual cases such as those of the subjects of the Swiss Republic, which has no maritime flag of its own. Swiss ships sail under the flags of various countries, any one of which might become involved in hostilities.[4]

There seems to be no injustice in the rule that ships under the enemy's flag may be captured without regard to their ownership. A ship carrying a foreign flag subjects itself to the authority, just as it enjoys the protection of its adopted country, which has the right to impress it as a transport for carrying troops to its enemy's shores. There is no reason why a belligerent should leave a prospective engine of war at the disposal of the enemy. If Switzerland has no maritime flag, that is her misfortune, just as it is her misfortune that she has no sea-port.[5]

[1] Hall, p. 504, n. It would be a great advantage if a uniform set of rules such as those adopted by the Institute of International Law were accepted by maritime countries (see *Annuaire* of 1904, p. 320).

[2] Wheaton, p. 469.

[3] Hall, p. 504. *Admiralty Prize Manual* (Holland), p. 6. The *Elizabeth*, 5 C. Rob. 2; *Industrie*, Spinks, 56.

On the same principle neutral liens and encumbrances will be disregarded. *Tobago*, 5 Rob. 218.

[4] Rivier, II. 343.

[5] *Primus*, Spinks, 49.

On the other hand, a neutral flag will not protect the share of an enemy, in a ship owned partly by neutrals and partly by belligerents.[1] In such a case, either the ship would be sold by the Court to realise for the benefit of the captors the value of the share of the hostile subject, or in the alternative the neutral co-proprietors would be permitted to buy it themselves.[2]

How will the Courts view a change of flag *flagrante bello*? Ships owned by subjects of several States can sometimes be registered in the country of each one of the co-owners. Supposing a vessel is owned partly by enemy and partly by neutral subjects and, flying the enemy flag, is registered in a neutral country in time of war, without any change of ownership, will the share of the neutral be still condemned on the principle laid down in the case of the *Elizabeth*, or will the share of the enemy alone be seized, as in the case of the *Primus*? It is submitted that the change of flag will be permitted. The English Courts, unlike the French, do not consider a ship an indivisible organism and the share of a neutral in a ship is considered a separate entity. It is condemned under the hostile flag because the

[1] In 1870 the Conseil d'État released the *Palme*, a ship belonging to the Protestant Mission at Bâle, but flying the German flag, on the ground that Switzerland having no flag of her own her ships were compelled to sail under those of other countries. As a matter of fact, the *Palme* would have been been released in any case as being the property of a religious society. (De Boeck, p. 172.)

[2] The French doctrine is that "*la propriété du navire, au point de vue de l'exercice des droits de la guerre, est absolument indivisible.*" (Turner, Barboux, *Jurisprudence*, pp. 71–77.) The character of a ship is determined as a whole by the flag it carries.

neutral's share is considered to have acquired an enemy character by seeking the enemy's protection. If it is open to every neutral person to return to his domicile of origin in time of war, there is no reason why, on the same principles, ships should not be permitted to sever their connection with the enemy.

The British Court of Admiralty will, however, disregard all transfers of ships from the subjects of the enemy to neutrals in cases where the latter have not yet taken possession under the agreement.[1] Further, all such transfers made during or in contemplation of war are void unless there is the strictest proof of completion and *bona fides*.[2] If the seller retains the right to rescind the contract,[3] or if payment of the sale price is not proved,[4] the ship will be condemned.[5]

The question of the ownership is liable to become complicated in the case of vessels owned by corporations, the shareholders of which might be enemy or neutral subjects. No doubt can arise in the case of British ships, since no alien is permitted to own a share in them,[6] but the laws of other countries admit of such co-proprietorship between subjects of different States.

[1] *Vrouw Margaretha*, 1 C. Rob. 336.
[2] *Ariel*, 11 Moore, P.C. 119.
[3] *Minerva*, 6 Rob. 399.
[4] *Argo*, 1 C. Rob. 158.
[5] The French prize courts will not under any circumstances recognise the sale of a ship by a belligerent to a neutral during or in contemplation of war. (De Boeck, p. 174.)
[6] 57 and 58 Vic. c. 60, § 1.

It is conceived that the character of a ship will be determined by that of the corporation which owns it. If the corporation is neutral, the shares of enemy subjects will be safe from capture. On the other hand, the rights of neutral shareholders in a hostile shipping company will not be protected.

Neutral ships, like neutral persons, will be treated as hostile if they identify themselves with the enemy by engaging in his service, for example, as transports.[1] Lord Stowell condemned the *Orozembo*, a neutral ship, although it only carried three military and two civil officers in the service of Holland—then at war with England—to one of the Dutch colonies.[2]

Even if the neutral owner or his agent is ignorant of the nature of his service, or if the vessel has been impressed into the enemy's service by violence, the ship will none the less be condemned.[3] Both Hall and Westlake, however, condemn this practice, which is clearly as unjust as it is useless.[4]

The case of a neutral ship seized by a belligerent in hostile waters under the right of angary, appears, however, to be distinguishable. In this case *force majeure* is exercised on the owner, who, under a rule of international law, is divested of his property. The ship becomes the property of the enemy, and as

[1] 6 C. Rob. 420. *Cf.* the case of the *Kow-Shing*. Westlake, *International Law · War*, p. 25.

[2] The *Orozembo*, 6 C. Rob. 430. On the same principle, the Japanese prize court very properly condemned the *Australia*, an American ship found to have been chartered by the Russian Government and in its actual service. Takahashi, *International Law applied to the Russo-Japanese War*, p. 625.

[3] The *Carolina*, 4 C. Rob. 256.

[4] Westlake, *International Law War*, p. 154.

such becomes good prize of war.[1] The neutral owner is only entitled to compensation for loss of his property, and for that he must look to the power that dispossessed him, not to the captor.

Section III.—*What is Enemy Cargo?*

The general rule, as in the case of ships, is that the character of the cargo depends on the character of their owner.

Before discussing the exceptions to this rule, the ownership of a consignment as between neutral and enemy parties to a transaction must be settled.

The general rule is that when goods ordered are delivered by the consignor to the master of a ship they are delivered to him as the agent of the consignee, so that the property in them vests in the consignee from the moment of such delivery. In time of peace this rule may be varied by agreement or under a special trade custom. In time of war, however, the Courts of England and America refuse to allow any variations of the general rule by agreement as between a neutral consignor and an enemy consignee made during or in contemplation of hostilities.[2]

Even proof of a special custom of trade varying

[1] *Cf.* Art. 6 of the Japanese Regulations of 7 March, 1904, in the *Revue de Droit International Public* (1905), p. 613.

[2] The *Sally*, 3 C. Rob. 300, n. According to the French rule, war does not make any change in the principles applying to consignments by ship in time of peace. (De Boeck, p. 166)

the general rule as to ownership in goods consigned by ship would probably not save from confiscation property shipped by a neutral to an enemy consignee.[1]

In the converse case where the consignor is an enemy and the consignee a neutral, the law, as understood in England, is again partial to the belligerent. In this case it would be in the interest of the parties not to set up a fictitious contract, but to hide a real one; hence the Court will impose on the neutral the burden of proving that there is no special agreement in the case.

The rule does not seem to be unjust; it is merely an application of a well-established principle of the English law of evidence, according to which, "Where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour." [2]

Transfer in transitu.—Transfers of ownership of goods *in transitu* are valid in time of peace, but in time of war, or in contemplation of war, they will not be recognised unless the transferee has actually taken possession. The probability of fraud is held to be so high as to amount almost to a certainty.[3]

[1] Hall, p. 508.

[2] Taylor on Evidence (10th ed.), I., § 376 A.

[3] Hall, p. 506. The *Vrouw Margaretha*, 1 C. Rob. 336; the *Jan Frederick*, 5 C. Rob. 128. In 1854 the United States protested against the principle that sale *in transitu* was a presumption or evidence of *mala fides*. (Katchenovsky's *Prize Law*, p. 152.)

Neutral Property.—There are two ways in which goods at sea belonging to a neutral may become hostile because of the fact of war:

(*a*) If they are the produce of enemy soil.

(*b*) If they are connected with a house of trade on enemy soil.[1]

(1) *Produce of Enemy Soil.*—If a neutral owns property in the enemy State its produce will be considered enemy property and will be liable to capture. Though personally the owner may have no other connection with the enemy State, yet his land and its produce are considered to be part of the resources of the enemy. They are amongst the sinews of war on which the enemy can count to help him in the struggle:

"There are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of both parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."[2]

House of Trade.—Again, if a person domiciled in a neutral State has a house of trade or is a partner

[1] The contrary view is held in France: "Les biens n'ont pas par eux-mêmes de caractère neutre ou hostile, mais prenant toujours celui dont se trouve revêtu leur propriétaire. . . ." Le *Hardy* contre le *Voltigeante*, Pist. et Duv. I. 321. See also Le *Laura Louise* (1871), Barboux, *Jurisprudence*, p. 120.

[2] *Vrouw Anna Catharina*, 5 C. Rob. 167. See also Bentzen *v.* Boyle, 9 Cranch, 191.

in a firm in the enemy's territory, he will be considered an enemy in respect of his property and transactions in the enemy country.[1]

It is otherwise when a neutral merchant has merely an agent on hostile soil, provided he is not specially associated with it by the enjoyment of trade privileges or concessions.[2]

It follows that the property of a neutral connected with a partnership in enemy territory is confiscable equally with the property of an enemy connected with a partnership in neutral territory. "It is impossible not to see in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions."[3]

There seems to be no radical injustice in the law as laid down by the Courts. As a neutral house of trade in the enemy's country is subject to income-tax and to any special war taxes which the State may choose to impose, it is clearly a part of the enemy's resources. Similarly a domiciled enemy—English law knows of no other—will add to the resources of his own country if he is permitted to draw the profits of his neutral business.

[1] Hall, p. 500. Calvo, IV. ii. § 1934. *Jonge Cassina*, 5 Rob. 303 *Portland*, 3 Rob. 41.

[2] Hall, p. 501. Calvo, IV. ii. § 1934. *Anna Catharina*, 4 Rob. 119. The *Freundschaft*, 4 Wheat. 105.

[3] Wheaton, p. 467.

Section IV.—*Effects of Hostile Character.*

Enemy ships and goods and such neutral ships and goods as are considered hostile,[1] are exposed to capture and in some cases to destruction in time of war. Further, though neutral property as such is not in any way affected by the state of war, yet under certain circumstances it is exposed to damage or loss.

The case of enemy property must be considered first.

I. *Enemy ships and enemy goods in enemy ships.*

All enemy ships and all enemy cargo carried by such ships may be captured or destroyed.

Destruction may be conducted on two different principles.

(*a*) A belligerent weak on the sea may order its cruisers to destroy systematically all their captures and to bring in no prizes, as was done by the United States in the war of the Revolution and in the war of 1812–14, and by the Confederate States in the War of Secession.[2]

(*b*) Enemy ships may be destroyed under certain circumstances when a belligerent could not reasonably be expected to take them into port.[3]

The model rules of maritime capture adopted by the Institute of International Law at Turin in 1882

[1] Both classes will henceforth be included in the term "enemy goods" and "enemy ship."

[2] De Boeck, p. 291.

[3] Hall, 457.

provide that a captor may destroy a prize in the following cases:

"1. When it is impossible to keep the vessel afloat on account of its unsound condition, the sea being rough.

"2. When the vessel is too unseaworthy to be able to follow the man-of-war, and might easily be recaptured by the enemy.

"3. When the approach of a superior hostile force renders the captured vessel liable to be retaken.

"4. When the man-of-war cannot man the captured vessel with an adequate crew without a too great diminution of that necessary for her own safety.

"5. When the nearest port to which the captured vessel could be taken is at too great a distance."[1]

Destruction in the first case is no doubt a harsh exercise of belligerent rights, but it is not a violation of International Law. In the second case it is unquestionably permissible.[2] Destruction in both these cases has uniformly been held permissible by the British Court of Admiralty. "If impossible to bring in, it is their" (the captors') "next duty to destroy enemy's property";[3] and in the case of the *Leucade* during the Crimean War, Dr. Lushington said that "It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing into adjudication at all of an enemy's vessel is not called for by any respect to the right of the

[1] *Ann. de l'Inst.* 1883, p. 221.
[2] Hall, p. 457.
[3] The *Felicity*, 77. Dodson, 383. Hall, 476, n.

enemy proprietor, where there is no neutral property on board."[1]

The distinction between the two systems of destruction is important, as will be seen later, in cases where neutral property is destroyed along with enemy ships.

II. *Enemy goods in a belligerent's own ships.*

From the point of view of municipal law, ships are floating portions of the national jurisdiction. Goods, therefore, belonging to an enemy and found in a belligerent's own ships will not be subject to the law of maritime capture, but will be on the footing of the movable property of enemy subjects found on a belligerent's territory. The case under consideration will seldom occur except at the outbreak of war, since carriage of the enemy's merchandise, like other commercial intercourse, would be forbidden during the war.

III. *Enemy goods in neutral bottoms.*

Under the Declaration of Paris of 1856 "the neutral flag covers enemy merchandise except contraband of war." With this exception, therefore, goods belonging to enemy subjects are inviolable in neutral ships. Rivier, however, says that the immunity does not extend to the public property of the enemy State, which may still be seized wherever

[1] The *Leucade*, Spinks, 251.

found. There seems to be no authority for this statement.[1]

We will now turn to the property of neutrals.

The Declaration of Paris grants immunity from capture to neutral goods found in belligerent vessels. They still, however, labour under certain disadvantages which will now be considered.

(1) The French Courts hold that all goods seized under the enemy flag are to be presumed to be enemy property until the contrary is alleged and proved. If the burden of proof laid on the neutral claimant of the goods is not discharged they will be condemned. Where, however, the papers before the Court give incontrovertible proof of the neutral character of the merchandise they will generally be released.[2]

(2) During the Crimean War both the English and the French Courts held that the neutral owner has to bear the costs of proving his case, and is further liable to pay freight to the captor in proportion to the part of the voyage performed.[3]

(3) Neutral goods are liable to be destroyed with the enemy ship.

The Conseil d'État held in the case of the *Ludwig* and *Vorwärts* that it is permissible to destroy hostile ships under certain circumstances, and that no damages will be awarded for neutral cargo lost with them.[4] It is worthy of note that Article 20 of the supplementary instructions of the French Minister of

[1] Rivier, II. 429.

[2] The *Wilberforce*; the *Wiederkunft*, Barboux, *Jurisprudence*, pp. 91–92.

[3] Orione *v.* Averne, Pistoye et Duverdy, II. 499. De Boeck, 149.

[4] Barboux, *Jurisprudence.*

There are great differences of opinion, however, with regard to enemy property at sea. The divergent practice of States in the matter of recaptures, where on grounds of policy the capture is altogether disregarded as between the recaptor and the original owner, has somewhat blurred the true legal principles.

In the Middle Ages all movable property seized from the enemy vested completely in the captor from the moment it was brought *intra praesidia.* In the seventeenth century, however, it began to be the fashion to hold that a captor acquired the ownership of captured property after a possession of twenty-four hours, a view already adopted by the French edict of 1584, and by England and Spain as well as by the Dutch Republic and Denmark.[1]

From the seventeenth century onward the twenty-four hours rule gradually loses force. An increasing number of writers maintain that property in a thing only ceases when the captor has taken it to a safe place of custody. "Probably, therefore," says Hall, "it may now be said that so far as exceptional practices have not been formed, property in movables is transferred on their being brought into a place so secure that the owner can have no immediate prospect of securing them."[2]

In the case of the *Santa Cruz* Lord Stowell said: ". . . In the arguments of the counsel, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when

[1] Hall, p. 454. [2] *Ibid.* p. 455.

property vests in the captor; and it certainly is a question of much curiosity to inquire what is the true rule on this subject; when I say the *true rule* I mean only the rule to which civilised nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general rule.

"It may be fit there should be some rule, and it might be either the rule of immediate possession or the rule of pernoctation and twenty-four hours possession; or it might be the rule of bringing *intra praesidia*: or it might be a rule requiring an actual sentence of condemnation—either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another, but the fact is there is no such rule of practice; nations concur in principle, indeed, so far as to require firm and secure possession; but their rules of evidence respecting the possession are so discordant and lead to such opposite conclusions that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European States more distinctly agreed on any principle as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it. . . ."[1]

In a later case, however, the same eminent judge

[1] Sir W. Scott in the *Santa Cruz*, 1 Rob. 49.

says: "In later times, an additional formality has been required, that of a sentence of condemnation in a competent Court, decreeing the capture to have been rightly made *jure belli*: it not being thought fit in civilised society that property of this sort should be converted without the sentence of a competent Court, pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. The purposes of justice require that such exercises of war shall be placed under public inspection, and therefore the mere *deductio intra praesidia* has not been deemed sufficient."[1]

In the *Kity*,[2] Portalis laid down that "le propriétaire français, capturé par le sujet d'une nation en guerre avec la nôtre, est irrévocablement dépouillé de son bien, si la situation ne change pas. . . ."

According to Hall, "As the property in an enemy's vessel and cargo is vested in the State to which the captor belongs so soon as an effectual seizure has been made, it may in strictness be disposed of by him as the agent of his State in whatever manner he chooses. . . . But as the property of belligerents is often much mixed up with that of neutrals, it is the universal practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly or only in part the property of the enemy."

[1] The *Henrick and Maria*, 4 C. Rob. at p. 55.

[2] Pistoye et Duverdy, II., p. 129. *Cf.* Twiss, p. 349, § 176.

And again, "It is the invariable modern custom for the State to cede its interest in vessels belonging to private owners to the actual captors, and the property so ceded does not vest until adjudication has been made by a competent tribunal; but this is merely an internal practice, designed to prevent abuses, and has no relation to the date at which the property of the State is acquired." [1]

Rivier, on the other hand, insists on a sentence of condemnation by a competent prize court to complete the captor's title:

"Even after entering port, and even after the lapse of the twenty-four hours, seizure or capture does not make the State which has made the capture the owner of the vessel and cargo seized.

"It is essential that the prize tribunal or court should declare that the seizure was lawful. Whether the captor is the commander of a man-of-war or a privateer, the legality of his capture must in any case be pronounced upon by the competent authority. . . .

"If the capture is recognised as lawful, the vessel or the cargo, or both, according to circumstances, are declared lawful prize. From that moment the ownership is transferred. The owner has lost it; the State which captured it has acquired it, and from henceforth the prize belongs to it, *bello parta*

[1] *Int. Law*, pp. 456 (n.), 457. See The Henrick and Maria, 4 C. Rob., p. 43.

cedunt rei publicae. The reward which the State gives or may give to the vessel which made the capture is regulated, in very varying manner, according to its own laws.

"It is an essential principle that the judgment of a prize court is always necessary, nor will either the destruction of the vessel or its re-purchase do away with this necessity."

The judgment of a prize court, it is submitted, does not vest the prize in the captor or confer any new rights on him. It merely decides whether the ship has actually been lawfully and effectually captured or not, and gives a decree declaratory of this fact. Previous to judgment a prize captured from the enemy is liable to be taken before a court and released. As to neutral ships captured as hostile there is at least a presumption that they are not enemy property until so declared by a prize court. As between the original owner and the captor, seizure of the goods, coupled with the power and intention to retain them, is a sufficient divestment of the property, yet, so far as third parties are concerned, a fact of which there is no conclusive proof is practically non-existent. The captor has a title, but no title-deeds.

The evidence required to prove effectual seizure is different in different countries, but "from motives of public policy, for the sake of greater certainty and the promotion of the peace and quiet of the community,"[1] various absolute presumptions of the law have been

[1] *Cf.* Taylor on Evidence, § 62.

adopted, such as the rule of twenty-four hours' possession, of taking *intra praesidia* and others.

If a ship, captured but not duly condemned, is found in neutral jurisdiction after the war, the original owner is entitled to sue for its recovery in the neutral courts, and the latter have to decide the case on its merits. The judgment of a prize court, on the other hand, has the force of *res judicata.*

CHAPTER IV

EXCEPTIONS TO THE RULE OF CAPTURE OF PROPERTY AT SEA

It was formerly the custom, when war was contemplated, to place under embargo foreign ships found in the territorial waters of a State, so that a certain amount of the enemy's property might be available for condemnation at the very outset.

The practice not only fell into abeyance during the nineteenth century, but the contrary custom of allowing a certain number of days of grace to the vessels of enemy subjects gradually became established. This was done in the case of Russian vessels which had already sailed from any foreign port for a British port before the declaration of the Crimean War. They were allowed to discharge their cargoes and to depart unmolested to any port not blockaded by her Majesty's Fleet. Similar indulgence was shown to the enemy's ships by France in 1870, by Russia in 1877, and by the United States and Spain in 1898.

Convention VI. of the last Hague Conference has now converted this beneficent practice into

positive law as between its signatories. Its material provisions are as follows :

Art. I. When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Art. II. A merchant-ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above Article, or which was not allowed to leave, cannot be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

Art. III. Enemy merchant-ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, cannot be confiscated. They are only liable to detention on the understanding that

they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation; but in such case provision must be made for the safety of the persons on board as well as the security of the ship's papers.

After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war.

Art. IV. Enemy cargo on board the vessels referred to in Articles I. and II. is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.

The same rule applies in the case of cargo on board the vessels referred to in Article III.

Art. V. The present convention does not affect merchant-ships whose build shows that they are intended for conversion into warships.

Art. VI. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.[1]

There are several exceptions to the general rule that all enemy ships are liable to capture, together with the hostile cargo carried by them. These cases will now be considered.

[1] Whittuck, *International Documents*, pp. 152, 153.

It will be noticed that the privilege of exemption is much more firmly established in some cases than it is in others. In a few it is only suggested.

I. Vessels engaged in religious, scientific, and philanthropic missions are now secure from capture under Art. 4 of Convention XI. of the last Hague Conference. As a matter of fact, they had always enjoyed this privilege. Thus in the eighteenth century Bougainville and La Pérouse were furnished with passports by the British Government to protect them in case war broke out during their voyage, and similarly, in 1776, the French Government directed all its men-of-war to abstain from molesting Captain Cook so long as he committed no hostile acts. The Austrian corvette *Novara* enjoyed a similar privilege in 1857–9, and so did the ships that searched for Sir John Franklin (1848–59).[1]

On the ground of their general usefulness, ships and boats belonging to pilots, and also vessels attached to lighthouses, are exempt from seizure.

II. *Cartel ships* are vessels employed in time of war for the carriage of exchanged prisoners. They sail under the pass of a functionary called a Commissary of Prisoners, who resides in the country of one of the belligerents. These vessels are exempt from capture or detention on their voyage to and from their destination so long as they are actually engaged in this service, whether they have prisoners on board or not.[2] They are not permitted to carry

[1] Hall, p. 425.

[2] *Admiralty Manual of Prize Law* (Holland), 1888, pp. 11–12, 141–3. *La Gloire*, 5 C. Rob. 192.

cargo or despatches on pain of seizure.[1] Further, a vessel sailing without a pass from a Commissary of Prisoners, but professing to be a candidate for cartel service, does not enjoy the same immunity.[2]

III. *Hospital Ships.*—Convention X. of The Hague Conference, which will no doubt be generally accepted by civilised countries, adapts to maritime warfare the principles of the Geneva Convention of July 6th, 1906. The following articles deal with public and private property employed in the service of the sick and wounded at sea.

> Art. I. Military hospital ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick, and shipwrecked, and the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last.
>
> These ships, moreover, are not on the same footing as warships as regards their stay in a neutral port.
>
> Art. II. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognised relief societies, shall be likewise respected and exempt from capture, if

[1] *La Rosine*, 2 C. Rob. 372. *Venus*, 4 C. Rob. 355.
[2] *Daifjie*, 3 C. Rob. 142.

the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

Art. III. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognised societies of neutral countries, shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorisation of the belligerent himself, and that the latter has notified their name to his adversary at the commencement of or during hostilities, and in any case before they are employed.

Art. IV. The ships mentioned in Articles I., II., and III. shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

The Governments undertake not to use these ships for any military purpose.

These vessels must not in any way hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a Commissioner on board; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log-book of the hospital ships the orders which they give them.

Art. VII. In the case of a fight on board a warship, the sick-wards shall be respected and spared as far as possible.

The said sick-wards and the material belonging to them remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.

Art. VIII. Hospital ships and sick-wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.

The fact of the staff of the said ships and sick-wards being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, is

not a sufficient reason for withdrawing protection.

Art. IX. Belligerents may appeal to the charity of the commanders of neutral merchant-ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.

Art. X. The religious, medical, and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the Commander-in-Chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.[1]

[1] Whittuck, *International Documents*, p. 174 *et seq.*

IV. *Personal Effects of Passengers and Crew.*—During the war of 1870 the French Conseil d'État established a very reasonable exception in favour of the personal property of passengers as well as of the captain and crew on board ships captured by the French navy.[1] Maritime capture is intended to strike at the commerce of the enemy in general, not at individuals. It would shock the conscience of the civilised world if the captors proceeded to lay hands on the wearing apparel and similar objects belonging to the persons on board. The gain to the captors would be insignificant as compared with the sufferings of their victims.

The same cannot be said of the extension of the rule in favour of goods carried by way of a commercial speculation by the passengers or crew. Except in cases where its quantity is negligible,[2] there is no reason why hostile merchandise at sea should be free from capture merely because its owner happens to travel by the same ship.[3]

V. *Fishing Vessels.*—Ships fishing in the deep sea are in the same category as the rest of a nation's mercantile fleet; vessels engaged in coast-fishery, however, are now rendered immune from capture by Art. 3 of Convention XI. of The Hague Conference, which runs:

> Vessels used exclusively ror fishing along the coast or small boats employed in local trade are

[1] *Don Julio*, Barboux, *Jurisprudence*, p. 86. *Joan, ibid.* p. 106.
[2] *Joan, loc. cit.* [3] *Don Julio, loc. cit.*

exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while maintaining their peaceable appearance.[1]

This immunity, which is based on motives of humanity, was by no means firmly fixed in the Law of Nations before its acceptance by The Hague Conference, and it will be interesting to glance at the history of the question.

France had become specially identified with the practice in favour of fishing craft as early as the time of Froissart. In 1521 a treaty was concluded between Francis I. and Charles V. at Calais under the auspices of Henry VIII. of England and the Pope with the special object of assuring the immunity of the coast-fisheries of the contracting parties between the months of October and January inclusive. The practice was observed by both sides during the Anglo-French wars of the Middle Ages, but fell into desuetude in the reign of Louis XIV., when the ordinances of 1681 and 1692 subjected fishermen's boats to seizure. At the commencement of the war of American Independence, however, France resumed her ancient tradition, and in a letter

[1] Whittuck, p. 185.

to the Admiral dated June 5th, 1779, Louis XVI. directed that the English fisher-folk and their property should be spared, provided they in no way aided the military operations of the enemy.[1] With exceptions in 1800 and 1801 the practice continued to be observed during the wars of the French Revolution and the Empire. The United States followed the French rule in the war against Mexico in 1846, and France maintained it in the Crimean, Italian, and Franco-German Wars. During the Crimean War, however, British cruisers destroyed the boats and fishing-tackle of the fisher-folk in the Sea of Azov, an act which evoked much hostile criticism.[2]

VI. Shipwrecked vessels, and those driven into a hostile port from stress of weather or from want of provisions, have sometimes been allowed to depart unmolested. Thus in 1776 an English man-of-war, the *Elizabeth*, which had put into Havana in distress, was not only allowed to repair, but was—with rather misguided chivalry—given a passport on leaving.[3] Again, in 1799, the Prussian vessel *Diana*, driven into Dunkirk by bad weather, was released by the *Conseil des Prises*.[4]

The precedent of the *Diana* was, however, soon reversed, and the doctrine of the French Courts made conformable to that of the *Ordonnances*, which had always denied exemption.[5]

In spite of what has been said to the contrary

[1] De Boeck, *De la propriété privée ennemie sous pavillon ennemi*, p. 219.

[2] *Ibid.* p. 222.

[3] Pistoye et Duverdy, *op. cit.* I. 115–6. In 1757, however, a French vessel, the *Belliqueux*, which anchored in Bristol under similar circumstances, had been captured. Ortolan, *Dip. de la Mer* (1864), II. p. 323.

[4] Hall, p. 443.

[5] De Boeck, pp. 225–6.

by some authors,[1] it is clear that there is no binding rule in the matter, and that a belligerent is entirely free to act as he pleases.

VII. *The Post.* It is to the abiding credit of Germany that she secured at The Hague Conference the adoption of the following rules in regard to postal correspondence.

> Convention XI. Chap. I. *Postal Correspondence.* Art. I. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.
>
> The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for, or proceeding from, a neutral port.
>
> Art. II. The inviolability of postal correspondence does not exempt a neutral mail-ship from the laws and customs of maritime war as to neutral merchant-ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

Mail Steamers.—It has been suggested by some writers that the privileges of postal mail-bags should be extended to mail steamers. Considering their importance in the intellectual and commercial life of the community of nations, it is no doubt in the

[1] *E.g.*, Bluntschli, § 668.

interest of neutrals that some such rule should be adopted. Three cases may be considered:

(1) *The Steamer Plies between the Two Belligerent Countries.*—In this case the immunity could continue till denounced by either party. Such a convention with regard to the Channel mail-boats has indeed been in force between Great Britain and France since 1833.

(2) *The Steamer Plies between the Enemy State and Neutral Countries.*—De Boeck[1] suggests that enemy mail steamers should be neutralised, *i.e.*, placed on the same footing as neutral ships, and exempted from capture. The belligerent will always have the right of visit and search, a sufficient safeguard for his interests.

(3) *The Steamer Plies between Two Ports of the Enemy.*—Here a belligerent will often be specially interested in its capture, and could not be expected to give up a valuable right.[2]

VIII. *Submarine Cables.*—The enormous development of international communications during the last half-century could not be better illustrated than by a comparison of the chart of the existing submarine cables of the world with that of fifty years ago.

The necessity of taking special measures for the protection of this important institution of modern life soon became apparent, and led to a number of treaties from 1863 onwards. Finally an international

[1] P. 240.
[2] See De Boeck, pp. 239-240.

convention was signed at Paris on March 14th, 1884,[1] regulating submarine cables in time of peace.

If sea-cables are an important instrument of peace, they are at the same time a most potent implement of war. Time is money to the merchant as well as to the military commander. In order to keep the mastery of the sea, it is not only necessary to have ships and coaling stations: it is of equal importance to possess sure and rapid means of directing the movements of fleets on the chessboard of the seas. In fact, "a modern war between two naval Powers has reduced itself largely to a question of coals and cables." [2]

The topic is of special importance for England, as her "sea power is not alone measured by the number, character and tonnage of her warships; it is immensely increased by the system of an exclusively controlled submarine cable network, at present including nearly four-fifths of all the cables of the world, woven like a spider's web to include all her principal colonies, fortified posts, and coaling stations." [3]

Two theories have been put forward as to the nature of submarine cables. The one assimilates them to ships and considers them subject to the same burdens as movables afloat. According to the other, which is conceived to be the true view, a sea-cable

[1] Rivier, I. p. 386.

[2] G. O. Squier, "Influence of Submarine Cables on Military and Naval Supremacy," in the *Proceedings of the U.S. Naval Institute*, XXVI. (1900), p. 500.

[3] *Ibid.* p. 602.

is a "geographical fact,"[1] a kind of bridge connecting two territories.[2]

The theory of territoriality leads to important deductions:

1. Submarine cables are not movable property. They are not subject to the general right of capture of property at sea.

2. They are, however, liable to be damaged or destroyed by the enemy in circumstances analogous to those permitting the exercise of the rights of war on telegraphs on land.

3. Submarine cables are under the territorial jurisdiction of the State on whose shores they terminate. If they end in two separate jurisdictions, they are subject to a *condominium* on the high seas.[3] Each State, however, has exclusive jurisdiction over them within its own territorial waters.[4]

4. A cable passing through the territorial waters of a foreign State enjoys the benefit of ex-territoriality provided it does not infringe the local laws.[5]

The rights of a belligerent in respect of sea-cables are well summarised in the following rules adopted by the Institute of International Law at Brussels in 1902:

1. The submarine cable uniting two neutral territories is inviolable.

[1] This is Professor Westlake's phrase—see *Ann. de l'Inst. de Droit Int.* XIX. (1902), p. 302.

[2] F. Scholz, *Krieg u. Seekabel* (Berlin, 1904), p. 39.

[3] *Ibid.* p. 44.

[4] *Opinions of the Attorneys-General of the United States*, XXII. p. 317.

[5] Scholz, p. 45.

2. The cable uniting the territories of two belligerents or two portions of the territory of one of the belligerents may be cut at any part except in territorial waters and in neutralised waters belonging to a neutral territory.

3. The cable uniting a neutral territory to the territory of one of the belligerents may not in any case be cut in territorial waters or in neutralised waters belonging to a neutral territory. On the high seas this cable may only be cut if there is an effective blockade and within the limits of the line of blockade, the cable being repaired with as little delay as possible. The cable may always be cut within the enemy's territory and in the territorial waters belonging to the enemy's territory to a distance of three nautical miles from the limit of low tide.

4. It is understood that the liberty of the neutral State to transmit messages does not imply the right to use it or permit it to be used to give actual assistance to one of the belligerents.

5. In the application of the preceding rules, no difference is to be made between State cables and those owned by private individuals, nor between cables belonging to the enemy and those belonging to neutral States.[1]

[1] *Annuaire de l'Institut de Droit Int.* XIX. (1902), p. 331. See also Renault, *R.D.I.*, XII. (1880), p. 265.

In the Russo-Turkish War of 1877, the Turks cut the English cable between Constantinople and Odessa, and a similar course was adopted by Chili in 1882 in her war with Peru and by the United States in Cuba in 1898 (Scholz, *Krieg und Seekabel*, pp. 20-21).

The U.S. Naval Code, Art. 5, lays down the following rules:

(1) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an

It is clear that where a belligerent lawfully cuts or destroys a cable within his enemy's territorial waters as part of the operations of war, the owners will not be entitled to indemnity. The analogy of the *jus angariae*, which has reference only to neutral property *in transitu* through a belligerent's jurisdiction, has no application here.[1]

enemy, are subject to such treatment as the necessities of war may require.

(2) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(3) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption (*ibid.* p. 30).

[1] *Opinions of the Attorneys-General of the United States*, XXII. p. 315. The claims of the British companies whose cables had been damaged in Cuban territorial waters by the American Fleet during the Spanish-American War were not pressed by the British Government on legal grounds and were denied by the United States (Scholz, *op. cit.* p. 25).

CHAPTER V

INVIOLABILITY OF PRIVATE PROPERTY AT SEA[1]

MARITIME law made great strides during the nineteenth century. The abolition of privateering and the immunity of enemy property under the neutral flag are triumphs of which European diplomacy may well feel proud. Many international jurists, however, are not content with what has already been achieved. They consider that maritime law still contains too many relics of barbarous practices to suit a civilised age, and they are determined not to rest until they bring the statesmen and the peoples of the world round to their view.

According to these writers—and on the Continent of Europe their ranks include many of the most eminent—the right of capture of private property at sea is an anachronism that ought to be abolished. A state of war should no longer involve the capture or destruction of private ships and cargoes save for breach of blockade or in case of contraband of war.[2]

[1] This chapter is reproduced with a few alterations from *East and West* of July, 1907.

[2] *Cf.* Fiore, II. ii. ch. 7, p. 320 *et seq.* Heffter, § 139. Bluntschli, § 665. Calvo, IV. vi. 2140.

The various considerations brought forward to support the proposed change in the law may be grouped under three heads, historical, quasi-jural, and political. These will now be discussed in their order.

I. The history of the question.

Ten years before the publication of Vattel's *Droits des Gens*, the Abbé de Mably wrote his *Droit public de l'Europe fondé sur les traités* (1748), which deserves to be remembered, not only because of its enthusiasm for the reform of international law, but also as being the first treatise to put forward the doctrine of the immunity of private property at sea. The Abbé directs his main attack against the system of privateering, and he does so, not only on the general grounds of humanity, but also because he considers privateers the chief instruments for the exercise of the right of capture which he aims at abolishing.[1]

For a generation the Abbé de Mably remained the solitary exponent of the new doctrine—a voice crying in the wilderness. The publicists of that age found their sources of International Law in the writings of Vattel and his predecessors, who all maintained the ancient rights of belligerents undiminished. The ideas of *Le Droit public de l'Europe* found no echo till the appearance, in 1782, of Galiani's treatise on the Duties of Neutrals, which advocates the abolition of privateering as well as of the right of capture of private property at sea, with the exception of contraband of war. Azuni followed in his footsteps.

[1] 9 Mably, *Œuvres* (1794–5), VI. 545.

It was left, however, for Rousseau in that age of mental ferment to formulate the theory of inviolability in all its completeness and to preach a dogma that has since become endeared to Continental jurists. We have seen how the author of the *Contrat Social* denied that war creates any relation between a State and hostile subjects. It was but the natural corollary to this doctrine to say that the immunity of enemy subjects extends also to their property on land and at sea.

In the nineteenth century opinion in favour of the new idea grew in volume and importance. Most of the great international jurists on the Continent, Mancini, Gessner, Heffter, Bluntschli, Calvo, and Rivier, to name only a few, have become its advocates, and they have been followed by public opinion in almost all Continental countries except France.

2. It has now to be seen how far the proposed change is supported by the practice of States.

The earliest instance is the famous treaty concluded between Prussia and the United States of America in 1785, Art. 23 of which provides that private property both on land and at sea shall be inviolable. The clause is remarkable but not important, for it was probably inserted because Frederick foresaw little chance of a war between the two countries. It was not repeated in the treaties of 1799 and 1829.[1]

In 1792 the French Legislative Assembly decreed the abolition of privateering and of the capture of private property at sea, and invited the executive to

[1] De Boeck, p. 60.

set about securing the concurrence of all civilised maritime States. Hamburg alone replied favourably to this appeal.[1] Napoleon gives expression to similar ideas in his Memoirs :

"The law of nations regulating maritime war has continued in all its barbarity ; the property of private individuals is confiscated ; private non-combatants are made prisoners. . . . The laws regulating war on land are therefore more in conformity with civilisation and the welfare of individuals ; and it is to be hoped that a time will come when the same liberal ideas will extend to maritime warfare." [2]

It is interesting to speculate whether these ideas were inspired by an enthusiasm for humanity or by hatred and jealousy of Great Britain.

From the beginning of its history as an independent nation the United States has become specially identified with the new doctrine that her delegates did not fail to press on the attention of both the Conferences at The Hague. As early as 1823 President Monroe proposed its adoption to England, France, and Russia. Of the three Powers, Russia alone gave a favourable response, qualifying its approval by the condition that the other Powers should also agree. Again, in 1856, when the United States was asked to adhere

[1] Hautefeuille, *Questions de droit maritime international* (1868), p. 64.

[2] "Le droit des gens qui régit la guerre maritime est resté dans toute sa barbarie ; les propriétés des particuliers sont confisquées ; les individus non combattants sont fait prisonniers. . . . Les lois qui régissent la guerre de terre sont donc plus conformes à la civilisation et au bien-être des particuliers ; et il est à désirer qu'un temps vienne, où les mêmes idées libérales s'étendent sur la guerre de mer."—Napoleon, *Mémoires* (ed. Garnier), III. 169-70.

to the Declaration of Paris *en bloc*, Mr. Marcy refused on the ground that it was the policy of the United States to avoid the burden of excessive armaments so far as possible, and that his country could not give up the right to employ privateers, which the Declaration sought to abolish, until private property at sea was made inviolable. In 1871 the United States concluded a treaty with Italy in which their cherished reform was embodied.

The Italian Maritime Code of 1865 had already accepted this rule in all cases where reciprocity is observed.

During the Danish War of 1864 the belligerents exercised the right of capture, but by Art. 30 of the treaty of peace of October 30th, 1864, both parties agreed to restore all their prizes and, where this was impossible, to pay compensation to the owners.

The war of 1866 between Austria and Italy is remarkable as being the first in which the principle of the immunity of the ships and cargoes of enemy subjects was declared at the commencement and faithfully observed to the end.

In 1868 the Diet of the North German Confederation resolved with practical unanimity that the new doctrine should be adopted in International Law, and in 1870 the Prussian Government, whose navy was insignificant, issued an ordinance exempting the property of French subjects afloat from seizure. France, however, was true to the old rule, and finally Prussia had to abandon her policy,

which, judging from her extreme rigour in the matter of contributions on land, was perhaps not entirely based on altruistic motives.

From the above very brief sketch of the history of opinion and practice in the matter, it is clear that there is nothing in International Law to prevent a belligerent from using the right of capture if he so chooses.

The proposed change has hitherto received support only from such States as are weak on the sea—Austria, Germany, and Italy—and from the United States, which until lately, at all events, has been free from the craving for an oversea dominion. France, in spite of her traditional receptiveness of novel legal theories, has held herself aloof, and England, since the time when the question was first seriously laid before her, has emphatically declared herself against any innovation.

II. The writers who support the proposed change take their stand on quasi-jural considerations which, when weighed, are found wanting.

(1) It is stated in the first place that Maritime Law, as it exists, contradicts and is in fact the sole exception to the fundamental principle governing the laws of war, that war is a relation of State and State only, and not of a State and hostile individuals.[1] The alleged principle cannot be accepted. If war is solely a relation of State to State, and if States are indeed mere limited liability companies with a personality independent of that of the aggregate of

[1] Rivier, II. pp. 330, 331.

their subjects, then the levy of even the most moderate contributions and requisitions or the least trespass on private land or destruction of private property in enemy territory ought to be considered unlawful, as being as much a violation of private property as maritime capture.[1] The disciples of Rousseau, however, admit perforce the right of belligerents to do these acts, without which no war could be carried on even for a day. If property at sea is made inviolable, it will be placed in a more favourable position than property on land.

(2) It is also urged that the practice is inhuman and unworthy of civilised nations.[2]

To this we may reply (*a*) that even if it is granted that it is an inhuman practice, it is the least cruel of all the practices allowed in war.[3] The bombardment of a thickly populated town, the infliction of crushing fines on communities on every trivial pretext, the dragging of inoffensive peasants from their homes at harvest time to make military roads without payment, are incidents of warfare on land which far surpass in cruelty the exercise of the right of capture.

(*b*) Under modern conditions, indeed, the loss resulting from a military campaign, even though pillage is forbidden, is far more extensive than can ever be inflicted by an enemy in naval warfare. The enormous armies of the great Continental Powers are

[1] Hall, 463. Westlake, *Chapters on International Law*, pp. 259, 260.

[2] Massé, *Le Droit Commercial dans ses rapports avec le droit des gens*, I. 153.

[3] Lorimer, *Revue de Droit international* (1875), 676–77.

like flights of locusts that eat up the occupied territory. They find plenty, and leave desolation behind them. During the Franco-German War France captured ninety ships of the total value of six million francs, whereas the damage caused by the Prussian occupation in France was calculated at the enormous figure of 600 million francs, of which sum 39 millions are accounted for by contributions alone.[1]

(*c*) The right of maritime capture is regulated by judicial tribunals, which, far from the scene of the conflict, examine and decide each case on its merits in accordance with precedents and rules of law. The levy of contributions is regulated by no laws and is controlled by no higher authority. In the excitement of a campaign vague maxims of moderation are forgotten, and the sole norm that remains is the length of a commander's temper.

(*d*) Acute individual distress and widespread social disorder are, unhappily, the common legacies of warfare on land. The attacks on the property of enemy subjects at sea cause general rather than special losses. Every ship and cargo afloat in time of war is insured, and the effects of capture by the enemy are spread over the whole community of merchants and shipowners who pay war premiums. Capture of private property at sea is in this way assimilated to contributions on land.[2] Besides, it is quite open to a State to indemnify its own subjects for their losses at sea, and thus convert

[1] Rouard de Card, p. 180. Barboux, *Jurisprudence*, p. 22.

[2] Tetens, *Droits réciproques des puissances belligérantes et neutres sur mer*, 1805, 1, § 7, p. 21.

private into national loss, as France did in the case of the sufferers on land from the German invasion of 1870–1.[1] A system of State insurance or indemnity could provide against loss at lighter premiums than private companies would accept. If a State finds this burden too heavy for its finances it deserves sympathy, but poor belligerents, like beggars, cannot be choosers. It is true that even under the most favourable circumstances State-insurance could compensate only for *damnum emergens* and not for *lucrum cessans*. So long, however, as war is war, the subjects of belligerent States must submit to forego some of their profits at sea, as they do on land in the case of an invasion.

Conclusive arguments can be adduced in support of the law as it stands :

1. There is a great difference in the nature of property on land and property at sea. The latter belongs in general to a special class—the mercantile community—and is intended to earn profits. If not interfered with, its owners hope to be richer by the adventure than they were before ; otherwise they would not expose their property to the risks of the sea when it would be safer at home. Property on land, on the other hand, may be an object of trade, but it is less easily distinguished as such than is the case with property at sea. It could only be seized as belonging to private individuals in general.

[1] *R.D.I.* (1875), pp. 676–77.

The most important consideration in modern warfare is that of money, without which a campaign could not be carried on for a single week. On what does a country rely more for the sinews of war than on its commerce? Commerce is the breath of modern States; they live by it, and they bargain and fight for it. The wars of the future will be commercial wars, and will aim at the starvation rather than the slaughter of the enemy. What more vulnerable point could a belligerent find in the armour of his enemy than its sea-borne trade, and what better means of shortening the conflict and obtaining victory than an attack on this trade? Indeed "the power of injuring an enemy's trade is the chief means upon which a maritime nation relies for its own protection and for bringing a war to a termination."[1] "The most decisive blow inflicted on the Confederate States was the destruction of commerce by closing the ports of egress and ingress" by a stringent blockade directed principally against cotton. The Chinese boycott of American goods some years ago achieved more than was effected by the burning of Charlestown or of Washington. There is no reason why a naval Power should not be permitted to effect a similar result in time of war by scaring away the American mercantile flag from the seas.

It may be objected that it is unjust to make this distinction to the prejudice of the mercantile community, which is quite as inoffensive as any other,

[1] Count Caprivi in the Reichstag. See the *Times* of March 5th, 1892.

and has interests strongly opposed to war. So long, however, as wars continue to be prompted by commercial jealousies and ambitions, so long as battles are lost and won in the interests of commercial influence, and countries are conquered for the sake of commercial expansion, it is unreasonable that the foreign merchant alone, the original cause of all this strife, should lose none of his profits and suffer no harm. Surely there is no injustice in suspending his lucrative activities whilst soldiers are shedding their blood for his sake in the swamps of Africa or on the arid deserts of Central Asia.

2. The sea is a most important field of human activity, and has ever been so since civilisation dawned on the shores of the Mediterranean. It was countries like Greece, with long coast-lines giving them easy access to the great highway of the world, that first emerged from barbarism. When the centre of gravity of the human race moved from the Mediterranean to the Ocean, Portugal, Spain, Holland, France, and finally England came to the front. In the case of many States the sea has been their almost exclusive sphere of action. The mystic annual wedding of Venice with the sea was no vain and meaningless ceremonial, for, like the sister-republic of Genoa, and like Tyre, Sidon, and Carthage of old, the better and fairer part of her dominion was on the waters.

The sea cannot, however, be occupied like the enemy's territory. It is the common property of mankind, and is free. The only effective means a

belligerent has of thwarting his enemy on it is to seize his private ships—which are, as it were, floating portions of his territory—and along with them their cargoes.

Were it not for this right, naval warfare would be reduced to a mere farce. Those Continental States which have no distant possessions to guard, and which rely on their land forces to defend their shores, would abolish their navy and continue their lucrative sea-borne trade whilst a baffled enemy promenaded in front of their coast defences. An effective blockade of their whole coast-line, besides being a difficult, would also be a fruitless undertaking, since their commerce would seek the hospitality of neutral ports, and maintain its activities undiminished in spite of the slight additional inconvenience.

3. Merchant-vessels can be used for warlike purposes, not only as transports for troops and war materials, but sometimes even as warships, as many mail steamers are so constructed as to be quickly convertible into cruisers. This was demonstrated in 1878, when the British Admiralty acquired the steamer *British Empire* and transformed it into the cruiser *Hecla*. As Count Caprivi said in the Reichstag, ". . . if hostilities began, it would be absurd that these vessels should be allowed quietly to steam into the ports of their own nation to unload their cargoes and then refit for action." [1]

An invasion of England by France or Germany would be impossible if these Powers had not their

[1] On March 4th, 1892. See the *Times* of the following day.

mercantile marines at their command, and circumstances may arise in which England's very existence may depend upon the capture of every description of vessel belonging to the enemy.

Ships have always been considered a peculiar species of movable property, and the legislation of most maritime Powers very properly reserves to the State special rights over all vessels carrying the national flag. Thus, under a Prussian law of 1873, the persons in possession of any Prussian ship are bound to place it at the service of the military authorities when requisitioned, and to sell it if necessary.[1] In England no British ship can be owned, even in part, by an alien.

The abolition of the right of maritime capture would not, of course, deprive a belligerent of the right to seize ships when his safety required it. He would always be entitled to do so under his general right of self-defence. But it may reasonably be asked why a country like England should give up a right so vitally important to her safety, and receive it back only under limitations.[2] A sudden preconcerted gathering of ships cannot always be foreseen. Innocent-looking vessels could safely collect at a rendezvous on some pretext or other, and then swoop down on an unguarded point on the enemy's coast.

It is suggested that a belligerent's objects would be equally served if captured ships were not appropriated, but merely detained and returned at the end

[1] Stoerk, *R.D.I.* (1878), pp. 359–360.
[2] Westlake, *Chapters on International Law*, p. 249.

of the war, subject to a moderate payment to the captors. This charge would correspond to contributions in land warfare, which were in their origin the price of exemption from pillage. In short, it is proposed to give a belligerent rights over enemy ships very similar to those he has over the railways of an occupied territory. To this it may be replied that the first and second objections against the *abolition of the right of capture apply equally to a modification* of the right. Nor must we forget an important distinction between ships and railways—viz., that the former, unlike the latter, can not only be used for transporting troops, but can also be made into actual engines of destruction.

It is no doubt desirable that war should be made humane, but it is difficult to see why its operations should be made ineffective; and when once it is admitted that an attack on a nation's sea-trade will cripple its resources and cause general and not individual loss, there is no valid reason for depriving a captor of part of his booty.

III. The question being purely one of political expediency, to be decided by each State after a consideration of its own especial circumstance, we will now consider what line it is expedient for England to adopt when called upon to part with what has so far been considered her great traditional weapon in naval warfare.

1. It is often urged that under the present law a great naval war would mean to England the loss of the chief part of her income from freights. Exposed

to the constant risk of capture or detention by the enemy, neutral trade would cease to patronise British ships. British trade would follow suit, and the stream of commerce would continue to flow from Birmingham or Manchester to the markets of the world under the shadow of neutral flags.

This argument neglects the fact that both the mercantile marine and the sea-borne trade of Great Britain are by far the largest in the world. Under existing conditions, foreign ships are only able to cope with their national commerce by the aid of the British mercantile marine, and if the latter is driven from the seas, neutrals will have more than enough work in transporting their own merchandise. British goods, therefore, will perforce continue to be carried in British bottoms.

A wholesale transfer of British ships to neutrals would not remedy the evil, even if sufficient neutral capital were forthcoming to buy them. Nations like France would refuse to recognise the validity of transfer made in time of war,[1] and in any case the ships would be taken before the enemy's prize courts to decide the validity of the transfer. Under this risk, the rates of insurance, if not altogether prohibitive, would be sufficiently high to kill most trades. The prospect of a delay of months in the enemy's ports would negative the attractions even of war profits.

From these considerations it follows that in a naval war, British shipping, as well as goods,

[1] See pp. 81, 82 *supra*.

would in great part remain under the Union Jack.

2. It is further urged that though the trade of Great Britain, thanks to her navy, is the best protected, yet from its enormous volume it is also the most vulnerable in the world. The history of the *Alabama* is quoted to prove how easy it is to attack maritime commerce and how difficult to defend it against *an active and determined enemy who, scorning to take in prizes*, aims only at their destruction.

It is, of course, true that the *Alabama* and her consorts practically drove the Federal mercantile flag from the seas for the time being, but their career "proves only what really needs no proof, that a single armed battleship can do immense damage to a mercantile marine consisting almost entirely of sailing ships wholly unarmed, if no attempt is made to bring her to book."[1]

An extraordinary conjunction of circumstances favoured the career of this famous commerce-destroyer. The whole of the naval forces of the North were engaged in the blockade of the Southern ports, and no units could be spared to hunt down the *Alabama*, which, provided with steam and sails, could catch, one after another, the slow-moving sailing vessels of the enemy and, at the same time, economise her coal.

The general substitution of the steam-engine for sails as the motive power in ships makes it

[1] *Brassey's Naval Annual* (1906), p. 55.

impossible that the feats of the *Alabama* should be repeated.

(*a*) In the old days a ship was a slave to the winds, and had to go where they took it. Now maritime commerce is confined to certain well-defined direct routes where the commerce-destroyer must lurk to catch its prey. It is much easier for a powerful navy to defend its commerce under these conditions than when it was scattered broadcast over the ocean. To use Admiral Bridge's words, protection will be best secured "by keeping the enemy's commerce-destroyers continuously on the look-out for their own safety."

(*b*) Again, if steam enables ships to take direct routes, it also gives them a wide discretion as to their choice. In these days of wireless telegraphy it will always be possible for the Intelligence Department of a State, if it is as efficient as it ought to be, to keep its merchant vessels informed of their dangers.

(*c*) If the commercial marine has vastly increased, the number of possible assailants has very largely decreased. "The tendency of modern naval development has been to increase altogether beyond comparison the power of individual units of naval force, but to diminish their aggregate numbers."[1]

In the year of Trafalgar the entire British Navy numbered 700-odd warships with a total tonnage of 634,278 tons, or less than that of 36 modern battleships. The entire British Navy in 1905 numbered only 370 units of every description, of which 253

[1] *Brassey's Naval Annual* (1906), p. 61.

were torpedo boats and destroyers, which are peculiarly unfitted for attacking commerce.

(*d*) Destruction of commerce by armed steamships is not a practicable scheme. Their preparation and equipment could not be kept secret, and, even if they succeeded in evading the vigilance of the enemy and put to sea, they would have to fly at the approach of every warship on properly patrolled routes.

(*e*) We have next to consider the difficulty of coaling, which is a paramount factor under present conditions. It is probably impossible for a warship to be out for more than fourteen days without a fresh supply of coal.[1] Let us assume that the hunting-ground of a commerce-destroyer is three days' steam from its base; we will suppose that it will keep three days' coal in reserve for the not improbable contingency of being chased by a warship. This will leave it only five days for its operations. Even where the ship's coal is supplemented by liquid fuel there will be so many risks that the game will hardly be worth the candle, except in some specially favourable localities, where other precautions would be taken.

(*f*) Even supposing, however, that the commerce-destroyer succeeds in getting safely to its hunting-ground and captures a prize, its troubles will still not be ended. The prize will either have to be taken into port or destroyed. If the former, a prize crew will have to be detailed to navigate it. This was a simple matter in former days, but is not so easy now.

[1] Admiral Bridge's evidence before the Food Supply Commission: Q. 11280.

A hundred years ago, half a dozen seamen under a midshipman could be trusted to take a vessel into port, but the complement of a steamer nowadays is highly specialised [1] and the space on board a modern warship limited.[2] A warship could not easily spare a portion of its ordinary crew to navigate the captured vessel. It could carry extra hands for this special purpose only with difficulty, even if a sufficient number of qualified men were available in time of war. If the prize were destroyed, its crew, at all events, would have to be taken on board. This would be impossible for a torpedo boat, and even the biggest warship could hardly find room for the passengers and crew of a great ocean liner.

The conclusion to be drawn from the above investigation is identical with the views expressed in the Memorandum of the Admiralty to the Stores Commission.

(1) That the command of the sea is essential to the successful attack or defence of commerce, and should therefore be the primary aim.

(2) That the attack or defence of commerce is best effected by concentration of force, and that a dispersion of force for either of those objects is the strategy of the weak and cannot materially affect the result of the war.[3]

If the enemy hopes to win the mastery of the seas from the British fleet, he will concentrate every

[1] Admiral Bridge's evidence before the Food Supply Commission: Q. 11281.

[2] *Ibid.* Q 11334.

[3] Report of Food Supply Commission, p 28, 122.

available ship for the struggle. If he has no such aims, he will disperse his fleet in the hope of harassing British commerce and capturing stray prizes. In this case the British Navy would, if we are to take the word of the Admiralty, be strong enough to retain the command of the seas, and at the same time to detach a more powerful vessel to bring to book every commerce-destroyer sent forth by the enemy that succeeded in evading the British fleet watching the hostile ports.

"It is not the taking of individual ships or convoys, be they few or many, that strikes down the money power of a nation; it is the possession of that over-bearing power on the sea which drives the enemy's flag from it or allows it to appear only as a fugitive: and which, by controlling the great common, closes the highways by which commerce moves to and from the enemy's shores."[1]

(3) It is also argued that England is a manufacturing country depending on her imports of the raw materials of manufacture. Further, she depends on foreign countries for about three-fourths of her food. An active enemy preying upon the cotton and wheat on the way to her shores could, it is said, ultimately starve her into submission. The mere dislocation of the trade in a great naval war would raise the price of bread to famine rates, and a revolt of the hungry masses in London and Manchester would force the hands of the Government.

Against this view we have the deliberate opinion of the majority of the Commission on Food Supply in time of war:

[1] Mahan, *Influence of Sea Power on History*, p. 38.

"That the effect of the naval and shipping evidence is conclusive as to the point that, while there will be some interference with trade and some captures, not only is there no risk of a total cessation of our supplies, but no reasonable probability of a serious interference with them, and that, even during a maritime war, there will be no material diminution in their volume,"[1]

except in the case of a reverse that would cost Great Britain her command of the seas.

The Commissioners go on to say:

"We do not, therefore, apprehend that any situation is likely to arise in which there would be a risk of the actual starvation of our population into submission. But we do regard with much concern the effect of war upon prices, and especially, therefore, upon the condition of the poorer classes; for they will be the first to feel the pinch, and it is on them that the strain of increased prices would chiefly fall. We do not, however, look with any great alarm on the effect of war upon prices, so far as concerns what we have referred to as the economic rise of prices—*i.e.*, the increase likely to be produced by the enhanced cost of transport and insurance in time of war. We consider that the addition to the price of commodities under this head will be covered by a moderate percentage on their ordinary cost, and we believe that even this moderate increase might to a large extent be obviated by the adoption of a scheme of National Indemnity."[2]

The Commissioners declare themselves, however, apprehensive of the dangers of a "panic" rise of prices due to false rumours and unfounded apprehensions of the intentions or achievements of the enemy, and they cite the alarm caused all along

[1] Report of Food Supply Commission, p. 59, 250.
[2] *Ibid.* 253.

the sea-board of the United States by the imagined feats of Admiral Cervera's fleet during the Spanish-American war.

It may be noted, however, (1) that the abolition of the right of capture of private property would in no way diminish this risk. The right of blockade would be a very good substitute for commerce destruction, and, when the latter is done away with, there will always be a tendency to strain the rules regarding the former, especially as the exact meaning of an "effective blockade" is by no means clear in these days of swift steamships. A blockade, on paper or otherwise, would be much more likely to cause a panic than a desultory campaign against British oversea trade. The blockade of the Southern States by the Northern fleet was at first purely a nominal one, and yet it was respected by all the neutral Powers. It is not impossible that a nominal blockade of the entire coast of England might be acquiesced in by a group of unfriendly neutral Powers.[1]

(2) The law of contraband has proved itself very elastic in the past and may be found to be so again in the future.

In 1884 France, desiring to put pressure on China, declared rice exported to its ports north of Canton contraband of war, on the ground of its importance in feeding the population as well as the armies of the Celestial Empire. Lord Granville strongly protested, and declared that England would not recognise any condemnation of British ships under this rule. No

[1] Westlake, *Chapters on International Law*, p. 251.

ship, however, dared to risk being taken before a French prize court, even with the hope of ultimate release. The trade was at once suspended, and the imports of rice into China ceased.[1]

France has not repudiated her action of 1884, and there is nothing to prevent a repetition of it with equal success in a war against England. The proposed change would, therefore, in no way secure England's food supply. She would always have to depend for it on the strong arm of her navy.

3. Will there be a reduction in naval expenditure? To reply to this question, we must consider the objects for which the British Navy is maintained.

The British Navy has in the main three duties :

(*a*) Defence of sea-commerce.

(*b*) Defence of the British coast.

(*c*) Defence of oversea possessions and maintenance of communications with them.

(*a*) *Defence of Sea-commerce.*—It is true that, in theory at least, the navy would no longer be needed for the protection of trade save against pirates and, in time of war, to convoy ships into British ports with contraband of war or in breach of the enemy's blockade. It has been seen, however, that there is every likelihood of the task of convoying ships in these cases becoming as onerous as protecting them from capture.

The annual expenditure on the British Navy is enormous, yet, if compared with the vast volume

[1] Hall, p. 663.

of commerce it protects, and also with what other countries spend on their sea trade, the British naval estimates are not unreasonable.

The following table gives the tonnage of the mercantile marine of the seven principal maritime powers and the amount spent, or estimated to be spent, by each of them on its sea-going force in 1908–9.[1]

	Tonnage of mercantile marine.	Naval expenditure.	Naval expenditure per ton of shipping.
United Kingdom	18,709,537	£32,319,500	£1·72
United States ..	4,854,787	25,833,217	5·32
Russia	974,517	10,184,540	10·45
Italy	1,285,225	6,266,193	4·87
Germany	4,232,145	16,596,561	3·92
France	1,833,894	13,178,748	7·18
Japan	1,142,468	8,094,884	7·08

(*b*) *Defence of the British Coast.* — For this England depends entirely on the Home fleet. The army, an efficient force but insignificant in comparison with the millions that a first-class Continental Power could have ready to pour on to her shores at a week's notice, is merely auxiliary to the navy for the

[1] The figures for the mercantile marine are taken from *Lloyd's Register of Shipping*, 1908–9 (Vol. III, p. 861), and include steamships of 100 tons gross and sailing vessels of 100 tons net displacement and over. In the case of Japan, sailing vessels of less than 300 net tonnage have been left out of account.

For the naval expenditure of various countries the Return on Naval Expenditure (Great Britain, etc.) to the House of Commons, dated June, 1908, has been used. The figures do not cover exactly the same period, but are sufficiently accurate for the purpose in hand.

purpose of home defence. The case of Germany, for example, is different. Her position

> "is embarrassed at once by the fact that she has, as regards the world at large, but one coast-line. To and from this all her sea-commerce must go; either passing the English Channel, flanked for three hundred miles by France on the one side and England on the other, or else going north about by the Orkneys, a most inconvenient circuit, and obtaining but imperfect shelter from recourse to this deflected route."[1]

With her ships secure from capture, Germany would be enabled to curtail her naval budget and rely on her coast-batteries and her armies to protect her. The law of blockade or of contraband would not affect her, since her ships would touch at neutral ports and communicate overland with Hamburg or Altona. The doctrine of Continuous Voyages would not apply to this traffic.

Under this head, therefore, England would be a distinct loser as compared with the Continental nations that are so eager for a change of the law.

(*c*) *Defence of Oversea Possessions.*—England, again, has to protect her lines of communication with India, Australia, China, and Canada—in short, the four corners of the earth, which would be threatened in time of war. She has to guard her oversea dominions, which are of vast extent and have enormous coast-lines studded with wealthy and undefended sea-ports. The United States has no foreign empire worth the name to protect, and has

[1] Mahan, *Retrospect and Prospect*, p. 165.

hitherto been free from the craving for one. Germany, Austria, and Italy have no stakes beyond the water worth comparison with those of England, another fact which explains their advocacy of the proposed rule.

England's wars are always beyond the seas, and, as was fully demonstrated by the Crimean War, the command of the sea is essential for their sucessful prosecution.

The wars of Continental nations, on the other hand, are almost entirely on land: Russia could attack India from her Central Asian bases, whilst England would have to send reinforcements across the seas. As matters now stand, practically the same ships that protect England's commerce guard her colonies and her own shores, and there will be no appreciable relief to the Admiralty if only one of its duties is abolished. The Mediterranean fleet, which now maintains the route to India, and at the same time protects British steamers, and the Pacific squadron, which watches over the safety of Australia, would still have to be maintained. France and Germany, however, would at once reduce their fleets in Chinese waters.

Besides, even if England had no empire to protect, no long lines of communication to maintain; even if her people accepted conscription, and her shores bristled with millions of bayonets, the advantages from a reduction of the navy would mean less to her than to any other great country. England teems with intrepid men wedded to a career on the sea,

men for whom life along her extended coasts has been an admirable training-ground for the navy. Her soil abounds in the iron of which warships are built and the coal that moves them. The skill of her engineers and her shipwrights, like that of her admirals and her sailors, is unrivalled. She bears with ease the burden of a great navy under which her poorer rivals would faint. Remove the handicap all round, and her rivals will become her equals or superiors.

The movement towards the abolition of the right to capture private property at sea has been supported by many men whose humanitarian motives it is impossible to doubt, but the moving springs of the policy of nations are deep-based in their solid self-interest. They are not to be found in the abstract principles preached by professors or embodied in the resolutions of peace congresses.

By accepting the principle of the inviolability of private property at sea, "you would be inflicting a blow upon our naval power, and you would be guilty of an act of political suicide." [1] The change would mark the sunset of England's greatness, and her fall from her high place amongst the nations of the earth.

[1] Lord Palmerston in the House of Commons, Hansard, CLXV. 3rd series (1862).

NOTE ON BELLIGERENT RIGHTS AT SEA

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THE immunity which is proposed for the enemy's mercantile flag would be a change in the laws of war so important that I willingly accede to my friend Mr. Latifi's request that I should contribute a note on it to his valuable volume. In view of what Mr. Latifi has himself written, it would be superfluous for me to discuss the practical results to which such a change would lead with reference to the safety or power of England. But although the British people and their representatives will have those results chiefly in their mind in deciding the question, its decision will involve the adoption or rejection of the dogma that the change is demanded by humanity, civilisation, or justice. For those who hold that dogma the decision of the practical question will follow of itself, without any real examination of its probable results. Even for those who are not convinced of the dogma, the fact that it is widely

assumed as a self-evident article in the creed of progress must tend to obscure the view, unless they have cleared their minds of all latent suspicion that it may be true. It will not therefore be superfluous to examine the philosophical and legal grounds on which the immunity of the enemy's mercantile flag is claimed, with as much insistence and repetition as are displayed in the assertion of those grounds.

The operations of war have for their object to compel the enemy State to accept such terms of peace as it is desired to impose on it, and as a means to that object to paralyse the enemy State—that is, to make all action impossible for it unless and until it accepts the terms desired. The impact of one State on another in war is intended to be like that of a torpedo-fish on its prey. The enemy's seat of Government is to be captured, and his Government pursued to any place to which it may be transferred. His resources are to be cut off by occupying as much as possible of the territory from which they are drawn, and by preventing as far as possible the creation of resources which might reach his Government. If industry is not interfered with in the part of his territory which is occupied, this is only because the occupying Power can prevent the resources created there from reaching him. And all this has hitherto been done by sea as well as on land, and by sea with the additional circumstance that, by the laws of blockade and contraband, so far as they respectively extend, the enemy's commerce under a neutral

flag is prevented, as well as that under his own flag, from contributing to his resources. Wealth in any form, with the power of action which it gives, is not allowed to reach the enemy across his sea frontier any more than across the limit which separates his occupied from his unoccupied territory, so far at least as it can be prevented from doing so while preserving to neutrals the notice and equality of treatment which the rules of blockade are intended to secure to them. The proposal now under discussion is not that the enemy's sea-trade shall be exempted from attempts to paralyse him, but that such attempts on it shall be restricted to cases in which it is equally lawful to interfere with it under the neutral flag. Nothing but the blindness of habit prevents us from seeing that commercial blockades, as distinct from the investment of fortified ports, are a war waged against neutrals. But if only sentiment can be gratified by limiting the war against the enemy's commercial flag, the war against neutrals is to continue, with the certainty that commercial blockades, when they have become the sole means of paralysing the enemy's sea-trade, will be practically carried as far as audacity can venture to strain or to violate rules.

The name in which this topsy-turvy policy is advocated is that of the immunity at sea of private enemy property as such, and this is asserted to be the extension to the sea of a principle admitted on land. In truth, however, the immunity of private enemy property is not admitted anywhere as absolute.

It is only admitted so far as it does not interfere with any operations deemed to be useful for putting pressure on the enemy or for defence against him. Even on land no house or factory which stands in the way of a directly military operation is allowed to escape destruction, nor is compensation for its destruction ever paid by an invader unless he is compelled to do so at the peace. And, still on land, the habit of exacting requisitions and contributions, lawful within the limits set by The Hague rules, proves that it is not only when they are under fire that private property and means are not sacred. The things and money requisitioned are deemed useful for the purpose of the invasion, and the invader takes them without being obliged to pay for or restore them. Other cases show even more closely the identity of the principles applied on land and at sea. An invader would not allow the unoccupied part of his enemy's territory to be enriched and strengthened by railway traffic into it from the part which he has occupied, or that goods lying in the unoccupied part, unproductive for want of transport, should be brought to market by the railways which he controls. So far as he can he prevents trade which might create resources for the enemy Government, and he is not deterred from doing so by the knowledge that his measures cause damage to individuals. There is no difference of principle between this and the prohibition by a maritime Power of the appearance of its enemy's commercial flag on the sea, enforced by the condemnation of the ship and of her cargo being

enemy property. That what is struck at is not primarily enemy's property but the trade is proved by the fact that, while the cargo is condemned, the captain and crew retain their personal effects if their conduct has been straightforward and open.

What it is really attempted to set up, under cover of a fallacious distinction between the practice on land and at sea, is the doctrine of Rousseau that individuals are foreign to a war. If that doctrine is sound, the interest of a State at war, however deeply involved, would not justify it in taking or interfering with the property of individuals. We may go further, and expose the absurdity of the premiss by pointing out the conclusion that it would equally forbid imposing war taxes on individuals. The assumption appears to rest on the truths that a State and an individual subject or citizen of it are distinct legal persons, and that a war is between States as legal persons. But the familiar example of a limited company and its shareholders shows that the latter, although distinct legal persons from it, are not, therefore, foreign to its operations, and may in certain circumstances be made liable for them. There may be a corporation for the operations of which its members are not liable, as a limited company of which the shares have been paid up in full, or a borough of which the mayor, aldermen, and burgesses are the corporators. But such cases can only exist under national law, the law of a superior power which sanctions the institution and is capable of preventing or remedying

the evils which might arise from it. It cannot be too strongly stated that in natural justice there is no power for individuals to form themselves into a group and disclaim responsibility for the actions of that group. The individuals who form the groups called States are not authorised by natural justice to disclaim the responsibility attaching to the actions of those States, and there is no authority over them to impose the regulations which such a disclaimer would render necessary. Their own consent as States may take the place of legislation, but such consent has not been given to the assertion that individuals are foreign to a war.

The legal fallacy would not have deceived so many if there had not been a time when wars were often made by sovereigns from motives of personal or dynastic ambition, which found little echo in the subject populations. The memory of that time has helped to cause the notion that individuals are foreign to a war to become almost a democratic principle. But since 1815 there have been no wars in Europe which were merely those of ruling persons or families, and not those of the respective combatant nations. The wars have not necessarily been approved of by the numerical majority, though this has often been the case, but always they have been approved by such a part of the population in each combatant State as, by its numbers and influences combined, must for all practical purposes, external as well as internal, be regarded as representing the nation. The motives have been various—the aggran-

disement or defence of the State—feelings of race, of nationality as contrasted with nation in the sense of State, of religion, even feelings of humanity excited by outrages in foreign countries—or the sympathy of political parties, Liberal or Conservative, with more or less similar struggles abroad. To these commercial and colonising rivalry may come to be added, as it has been in remoter periods, even if it has not in recent times, been a cause of European war. Such wars are as little foreign in international fact as in law to the individual whose desires or fears have made them, or who from loyalty or patriotism have fallen into line with the mass which made them. External as well as internal affairs are more and more directed by the popular will. This, it may be hoped, will become more pacific as enlightenment advances, but the popular will brooks resistance abroad as little as at home, and when it decides on war it will insist as much or more than any monarch on every means being employed to win success.

Lastly, if it cannot be maintained, either legally or as a question of political fact, that individual subjects or citizens are foreign to the wars of their State, there remains the plea urged on the ground of humanity—that they ought to be exempted as far as possible from the consequences of their solidarity. But they have to bear those consequences in land war, and in naval war the risk and loss are far more easily met and spread over the community by insurance, and by the increased price of the cargoes which escape the risk.

The conclusion is :—

(1) That there is no principle, consistent with the existence and nature of war, on which a belligerent can be required to abstain from trying to suppress his enemy's commerce under his flag :

(2) That between trying by commercial blockades to suppress the enemy's commerce under the neutral flag and allowing it to pass free under his own flag there is a glaring inconsistency :

(3) And that the subject is therefore open to be dealt with on the ground of the probable effects of any change in the law.

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THE END

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